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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

THE STATES OF OHIO AND INDIANA, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Clean Air Act, a State must prohibit emissions from within the State that "contribute significantly" to another State's failure to meet an air quality standard. This case involves the application of this statutory requirement to a situation where emissions in several upwind States contribute to air pollution in downwind States.

The question presented is whether, in this situation, U.S. EPA may define each State's "significant contribution" in terms of the relative costs of reducing that State's emissions, without regard to the amount of actual emissions that each State sends downwind.

PARTIES TO THE PROCEEDING

1. Petitioners Ohio and Indiana were petitioners in the court of appeals along with:

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality, and State of West Virginia, Division of Environmental Protection.

In No. 98-1596, Commonwealth of Virginia.

In No. 98-1615, State of Alabama, *ex rel* Bill Pryor, Attorney General.

In No. 98-1619, State of North Carolina.

In No. 98-1621, State of South Carolina.

In No. 98-1499, United Mine Workers of America.

In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:

Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.;
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;
Columbus Southern Power Company;
Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;

Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company d/b/a
Allegheny Power System, Inc.;
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Trail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission
Cooperative, Inc.;
Potomac Edison Company, The,
d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;
Southern Company;
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;
Mississippi Power Company;
Savannah Electric and Power
Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company
d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;

National Rural Electric Cooperative Association; and

American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri, through the Board of Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;

St. Joseph Light & Power Company;

The Empire District Electric Company;

Utilicorp United, Inc.;

City of Independence, Missouri; and

Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company.

In No. 98-1585, The Alabama Forestry Association, Inc., by and through its section, The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

In No. 98-1598, South Carolina Public Service Authority d/b/a Santee Cooper.

In No. 98-1601, American Municipal Power-Ohio.

In No. 98-1602, Fort James Operating Company;

Gilman Paper Company;

Rayonier Inc.;

Savannah Electric & Power Company;

Southeast Paper Manufacturing
Company; and
International Paper Company.

In No. 98-1608, PP&L, Inc.

In No. 98-1609, Council of Industrial Boiler Owners.

In No. 98-1611, Network for Workable Air Policies.

In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.

In No. 98-1618, Interstate Natural Gas Association of America.

In No. 99-1070, Appalachian Power Company, *et al.*

In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service
Corporation; and
Wisconsin Manufacturers & Commerce.

2. The single respondent in the court of appeals was the United States Environmental Protection Agency.

3. The following parties intervened in the court of appeals:

State of Wisconsin;
Virginia Manufacturing Association;
Detroit Public Lighting;
GPU Generation, Inc.;
American Gas Association;
Michigan Manufacturing Association;
State of New York;
State of Connecticut;
State of Maine;
State of Maryland;
State of New Hampshire;
Commonwealth of Massachusetts;

Commonwealth of Pennsylvania;
State of Rhode Island;
State of Vermont;
New England Council;
Natural Resources Defense Council;
Province of Ontario, Canada;
Environmental Law and Policy Center of the Midwest;
Clean Air Task Force;
Consolidated Edison Co. of New York, Inc.;
Natural Gas Supply Association;
Associated Industries of Massachusetts;
New Jersey State Chamber of Commerce;
Pennsylvania Power & Light;
American Lung Association of Metropolitan Chicago;
Appalachian Power Company, *et al*;
Dairyland Power Cooperative;
South Carolina Public Service Authority d/b/a Santee Cooper;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency;
City of Wyandotte Department of Municipal Service;
Interstate Natural Gas Association of America;
Network for Workable Air Policies;
Business Council of Alabama;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation;
PG & E Generating;
Sempra Energy;
Atlantic City Electric Company;

Delmara Power & Light Company;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund;
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group;
Wisconsin's Environmental Decade Institute;
Norman W. Sterling, Minister of the Environment, Province of Ontario;
Charles A. Harnick, Attorney General of Province of Ontario; and
Christopher Carl Haromy.

4. The following parties appeared as *amici curiae* in the court of appeals:

Government of Canada
South Carolina Chamber of Commerce;
North Carolina Citizens for Business and Industry;
Toledo Metropolitan Area Council of Governments;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

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PETITION FOR A WRIT OF CERTIORARI

The States of Ohio and Indiana respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

In a separate petition, filed on September 20, 2000, various industry parties seek review of the same judgment, *Appalachian Power Co., et al. v. U.S. Environmental Protection Agency,* No. 00-445, and we anticipate that another petition will be filed simultaneously with this one, on behalf of several other States, including Michigan.

OPINIONS BELOW

The opinion of the court of appeals is reported at 213 F.3d 663, and is printed in the Appendix to the Petition in No. 00-445 (hereinafter "No. 00-445 App.")

JURISDICTION

The decision of the court of appeals was entered on March 3, 2000. A rehearing petition was denied on June 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Upon motion of the State of Michigan, on behalf of itself, Ohio, Indiana, and several other petitioning States, this Court granted the petitioning States an extension until October 20, 2000, within which to file their petitions for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, namely Section 110(a)(2)(D) and 110(k)(5), 42 U.S.C. § 7410(a)(2)(D) and § 7410(k)(5), respectively, provide:

§7410(a)(2). Each implementation plan submitted by a State under this Act shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

* * *

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, ...

§7410(k)(5). Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184 [42 USCS § 7506a or 7511c], or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies . . . .

The EPA rule at issue in this case has been lodged with the Court by Petitioners in No. 00-445.

STATEMENT

This petition, like the others filed seeking review of the same judgment, concerns the problem of pollution migrating downwind from midwestern, southeastern and northeastern States to other, primarily northeastern, States. The United States Environmental Protection Agency (EPA) has issued a rule requiring 22 States and the District of Columbia ("23 States")[1] to revise their plans to reduce emissions of nitrogen oxides (NOx), because of the effect that they have downwind on the level of ozone in the air.[2] Eight of these 23 States, including Ohio and Indiana, sought review of this EPA rule in the court of appeals on the ground that EPA's method for determining how much each State should reduce its NOx emissions was premised on an incorrect interpretation of the Clean Air Act.

The relevant provision of the Act requires that each State prohibit emissions within the State that "contribute significantly" to another State's failure to meet an air quality standard adopted by EPA. 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Act further authorizes EPA to require States to submit plans "necessary" to achieve an

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[1] The court of appeals vacated the EPA rule as to three of the 23 States, Wisconsin, Missouri, and Georgia. The remaining nineteen states, plus the District of Columbia, are Alabama, Connecticut, Delaware, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia.

[2] Nitrogen oxides combine with another pollutant, volatile organic compounds, in the presence of sunlight to form ground level ozone, or "smog." This ground level ozone pollution differs from the problem of the ozone hole in the upper atmosphere.

adequate mitigation of this pollution. *Id.* § 7410(k)(5). EPA, however, interpreted these provisions to permit, when several States combine to cause pollution downwind, a definition of each State's "significant contribution" in terms of a single standard of how expensive it would be to reduce these emissions, without regard to the actual level of emissions sent downwind by each State.

To be specific, in promulgating its NOx rule, EPA stated that, before considering cost-effectiveness, it first considered several "air quality" factors. 63 Fed. Reg. at 57376 (lodged with the Court by petitioners in No. 00-445). In doing so, the EPA modeled the amount of emissions flowing downwind from the upwind States. This modeling showed that some upwind States have much less effect on downwind pollution than other upwind States, in both the amounts of NOx pollutants they contribute and the frequency with which such pollutants are contributed.[3]

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[3] One factor that EPA analyzed was the number of "parts" of ozone in a billion "parts" of air that an upwind State contributed to a downwind State as a result of the downwind flow of nitrogen oxides, an ingredient of ozone. The EPA standard for ozone is 125 parts of ozone in a billion parts of air. (Abbreviated as "125 ppb"). Analyzing four particular multi-day "episodes" when ozone pollution was particularly bad in the Eastern half of the United States, EPA generated statistics concerning the amounts of ozone (in parts per billion) that a given upwind State contributed to a downwind State and how often an upwind State contributed to a downwind State's failure to meet the EPA standard. For example, EPA found that Pennsylvania contributes at least 10 parts per billion of ozone to New York City during 91 percent of the times that New York City fails to meet the 125 ppb standard. In contrast, Indiana, under one analysis, contributed only 5 or more parts per billion of ozone and, under another analysis, contributed only 2 or more ppb of ozone, to only 4 percent of New York City's failures to meet the 125 ppb national standard. *Air Quality Modeling Technical Support Document for the NOx SIP Call*, U.S. EPA,

Using these data, EPA identified 23 States that contribute emissions to the failure of one or more downwind States to meet the national ozone standard. EPA found downwind emission from these 23 States to be in amounts "large and/or frequent enough to be of concern." *Id.* at 57381, 57390-57398. In fact, as the court of appeals itself stated (213 F.3d at 675), EPA used a "very low threshold" to include a State in its group of twenty-three contributors.[4]

For the critical steps of determining each State's "significant contribution" to, and "necessary mitigation" of, downwind pollution, however, EPA chose a factor other than air quality. EPA instead considered the cost-effectiveness of pollution control measures and

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Office of Air and Radiation, September 23, 1998 ("the TSD"), at p. C-13, C-14. Joint Appendix of Industry Petitioners before the Court of Appeals, Vol. 3, at 1048, 1156, 1157.

Another statistic that EPA generated was the percentage that upwind States contributed to the total amount of ozone *above* the 125 ppb standard during the four episodes. Using the New York City example again, Indiana contributes 1 percent to the total above 125 ppb, Ohio contributes 4 percent of the total above 125 ppb and Pennsylvania contributes 18 percent of the total above 125 ppb. By comparison, local sources contribute 55 percent of the total above 125 ppb (and, by definition of the statistic, 100 percent of the amount of ozone leading up to the 125 ppb standard). *See* 63 Fed. Reg. at 57,391-2.

[4] The threshold was a "magnitude" of contribution of 2 parts per billion of ozone considered in conjunction with "frequency" of contribution and "relative amount" of the contribution. For example, North Carolina was included in the group of States significantly contributing to New York City's ozone problem because it contributed 2 parts per billion of ozone to 2 percent of the times that New York City failed to meet the 125 parts per billion standard, and because it contributed 3 percent of the total amount of ozone in New York City that exceeded the EPA standard. *See* 63 Fed. Reg. at 57,392-3.

determined that, for each of these 23 States, its "significant contribution" to downwind pollution was the amount of emissions it could reduce by "highly cost-effective control measures." Specifically, regardless of the relative contributions of each of the 23 States, each State was required to make reductions in NOx emissions that could be accomplished for an average cost of $2000 per ton or less. *See* 63 Fed. Reg. at 57,377.

In the court of appeals, Ohio and Indiana (among many others) challenged EPA's methodology as inconsistent with the Act. The court, however, held otherwise.

The majority of the court of appeals found that "the fundamental dispute is over the clarity of the phrase 'contribute significantly.'" 213 F.3d at 677. The court stated that the term "significant" is not a one-dimensional term that limits EPA's consideration to health factors, but a term that allows consideration of cost-effectiveness as well. Further, the lower court stated that an agency was not barred from considering costs absent a "clear congressional intent to preclude consideration of cost." Finding that Section 110(a)(2)(D)(i)(I) of the Clean Air Act did not prohibit consideration of costs, the majority concluded that EPA could consider costs. 213 F.3d at 677, 679.

Addressing the implications of its decision, the majority recognized the fact that "where two states differ considerably in the amount of their respective NOx contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures." *Id.* at 679. Even more to the point, a State with a relatively small level of actual emissions flowing downwind, and whose emissions are relatively inexpensive to mitigate, will be required by the EPA rule to bear a disproportionately high share of the clean-up

cost. Acknowledging this point, the majority observed: "[T]he ultimate line of 'significance,' whether measured in volume of NOx emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs." *Id.* at 675. The majority, however, dismissed this objection by stating, when it upheld EPA's line-drawing on the basis of cost differential, that its decision "logically entail[ed] upholding this consequence." *Id.*

In his dissent, Judge Sentelle found that the EPA impermissibly substituted its own notions of cost effectiveness in place of the mandated Section 110(a)(2)(D)(i)(I) determination of "significant contributions." He noted that EPA did not apply the factors most logically relevant to identifying a significant contribution, and he found no basis for using cost effectiveness as the pivotal factor in applying the "significant contribution" mandate. *Id.* at 695-97 (Sentelle, J., dissenting).

Petitioners filed a joint petition for rehearing and rehearing *en banc* with the court of appeals. On June 22, 2000, the court denied both requests, with Judge Sentelle, voting in favor of the petition's requests.

REASONS FOR GRANTING THE PETITION

I. The Question for Review is One of Great National Importance.

The problem of air pollution in a downwind State, caused in part by emissions in upwind States, is an issue of obvious significance to the Nation as a whole. Interpreting correctly how the Clean Air Act apportions responsibility among upwind States for their share of downwind pollution is, consequently, a legal issue of pressing national concern, warranting review by this

Court. This issue of statutory interpretation, moreover, has yet to be addressed by this Court.

Ours is a federalist system, and the structure of the Clean Air Act is predicated on this premise. In both *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Company v. Environmental Protection Agency*, 427 U.S. 246 (1976), this Court has recognized the critical role to be played by the individual States in the implementation of the Clean Air Act, and the relative roles of the States and the U.S. EPA under the Act is also implicated by the issues under consideration in the two *American Trucking* cases scheduled for oral argument before this Court on November 7, Nos. 99-1257 and 99-1426. (In particular, the so-called "Subpart 2" issues in No. 99-1257 affect the authority of States to implement ozone reduction as intended by Congress.) This case now even more squarely implicates the appropriate share of responsibility each State bears for redressing the portion of the national air-pollution problem that its local activities have caused.

We do not deny that emissions that migrate downwind and cause pollution in other States create a problem that spills over state boundaries and requires a federal solution. But the question in this case is whether Congress, in enacting the Clean Air Act and its amendments, intended that the federal solution to this problem be one that ignores the significance of State boundaries.

EPA has interpreted the Act to permit it to identify contributing upwind States using a nominal threshold, and then to require each State in the upwind group to reduce its emissions according to a single "cost-effective" standard that does not bear a relationship to how much each State actually contributed to the downwind pollution in the first place. But this solution, whatever its other virtues, disrespects federalism and

thus is contrary to the basic structure of the Clean Air Act itself. Rather than defining the required solution for a State in terms of the contribution to the air quality problem that originates from within the State's borders, EPA has defined the solution in terms of its own notions of cost-effectiveness and economic fairness. This approach, however, exceeds the scope of the agency's authority. Instead, EPA must adopt an interpretation of the Act that, first, apportions the responsibility for reducing emissions among the upwind States in accordance with each State's actual share of these emissions and, then, permits each State to adopt the most cost-effective means of achieving this reduction within that State.

Interpreting the Act to require this kind of federalism-sensitive solution has no detrimental effect on air quality in any State. Consistent with the Act, EPA has the authority to insist on an appropriate level of pollution reduction to be achieved in a downwind State and, further, to require the upwind States to curtail their emissions so as to achieve the necessary reduction of pollution in the downwind State. The only issue here is how this burden on the several upwind States will be allocated among these States. In accordance with basic principles of federalism, as well as the specific language of the relevant provision of the Clean Air Act, this burden should be apportioned among the upwind States according to how much emissions each State actually contributed to the problem downwind.

II. The Specific Language of the Act Supports a Federalism-Sensitive Interpretation.

The relevant provision of the Act states simply that each State shall prohibit "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other State with

respect to any [national air-quality standard]." 42 U.S.C. § 7410(a)(2)(D)(i)(I). This language, which specifically refers to *emissions* in *amounts* that "contribute significantly" to pollution downwind, speaks of these "significant contributions" in terms of actual levels of emissions. Thus, the primary factor in defining a State's "significant contribution" to a downwind problem should be the actual pollution that the State sent downwind.

It is true, as the court of appeals noted, that the term "significant" is inherently open-ended and is susceptible of an interpretation that would consider costs of reduction as one of several factors in measuring "contributions" that require a regulatory response. But, it must also be emphasized, the adjective "significant" as modifying the noun "contribution" can also be easily defined to mean *measurable* and *non-minimal* effects in a downwind State. This definition of significance would confine the term to physical considerations, in keeping with the focus of the statutory language on actual emissions in a particular State and the air-quality effect they produce downwind.

This point shows, not that a correct interpretation of "significant contribution" may be had by plain meaning analysis of these two words alone, but instead that the meaning should be settled by reference to the overall structure and purpose of the Clean Air Act. Guided by this broader inquiry, our argument is that a correct interpretation of the Act may not ignore the importance of State boundaries in the way that the EPA did. While the national priority must be to adequately mitigate the problem of interstate transport of pollution, this solution may be obtained in a way that allocates responsibility in accordance with each State's share of actual contribution to the problem, and the whole structure or purpose of the Act itself expects this kind of proportional solution.

The Act also specifically provides that, if a State's plan for redressing its "significant contribution" to a downwind problem is inadequate, then EPA may require the State to revise its plan "as necessary to correct such inadequacies." 42 U.S.C. § 7410(k)(5). This provision reasonably may be construed to permit cost-effectiveness to be a factor in selecting among methods to achieve the "necessary" reduction in the upwind emission levels that have caused the "significant contribution" to the downwind problem. Even so, a reasonable construction of the statute as a whole still requires that cost-effectiveness be a subordinate factor to the initial determination of how much each State must reduce its actual emissions levels in order to avoid "contribut[ing] significantly" to the downwind pollution.

EPA's contrary approach leads to several anomalous and unreasonable results. First, EPA's choice of how costs should relate to defining "significance" of a State's contribution is arbitrary and not tethered to the Act itself. As even the majority of the court of appeals recognized:

> [The EPA] neither rests that [$2,000-per-ton] benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of "cost-effectiveness" (i.e., why "highly cost-effective" should be at that "height"). Accordingly, we must read the EPA as having understood that its selection of the cut-off point was essentially unbounded.

213 F.3d at 680. EPA's statement that the reductions are not "overkill" because *collectively* the reductions are not more than necessary to ameliorate downwind nonattainment, 63 Fed. Reg. 57,379, 57,403, 57,440, does

nothing to address the arbitrary, unbounded nature of the determination on a State-by-State basis.

EPA's use of the cost-effectiveness standard leads to marginally-contributing States being faced with huge pollution control costs for marginal air-quality benefits. For example, EPA determined that both Indiana and Pennsylvania contributed to New York's failure to meet the national standard that air should not contain more than 125 "parts" of ozone per billion "parts" of air. Under EPA's cost-effectiveness standard, each State must install $2000-per-ton pollution control measures. Yet, when the amount of ozone pollution above the national standard is analyzed, Indiana contributes only 1 percent of the amount and Pennsylvania contributes 18 percent of the amount. *Id.* at 57,391-2.

Another study shows that if Indiana imposes *no* additional controls, it will contribute an average of 2.1 parts of ozone to a billion parts of air in New York City in 2007, the year that EPA looked to as the target year for ozone reductions to occur under its NOx rule. If, however, Indiana imposes all of the controls required by EPA, the modeling predicts Indiana's contribution to New York City will average 1.7 parts per billion of ozone. *Assessment of the Contribution of Emissions from Northern OTAG States on Elevated Ozone Concentrations,* prepared for the Southeast Michigan Council of Governments, *reproduced in* Joint Appendix of Industry Petitioners before the Court of Appeals, Vol. 5, at 2021, 2036a.[5] Under the same study, Pennsylvania will contribute an average of 21.38 parts per billion of ozone before the $2000-per-ton controls and an average of 18.86 parts per billion after. *Id.*

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[5] EPA never performed any State-by-State modeling that shows the contributions of upwind states after its rule is implemented.

Two points result from this comparison. First, installation of controls in Indiana yields a nominal projected 0.4 parts-per-billion reduction in ozone in New York City compared to a projected 2.52 parts-per-billion reduction of ozone as a result of installation of controls in Pennsylvania. Controls in Pennsylvania would therefore have a more than six-fold greater effect on New York City than the same controls in Indiana according to this study. Second, because Pennsylvania would have installed "highly cost-effective controls," EPA would consider Pennsylvania's after-control level of 18.86 parts per billion of ozone to be an *insignificant* contribution. This is in comparison to a pre-control level of 2.1 parts per billion in Indiana that is considered by EPA a *significant* contribution. Thus, a relatively large contribution of ozone is considered insignificant under EPA's standard, while a nominal contribution of ozone is considered significant.[6]

There is an even broader point. Under EPA's approach, an upwind State that contributes a relatively large amount of pollutants downwind, but whose pollution happens to be particularly expensive to clean up, may escape having to bear a proportionate share of the clean-up costs. In other words, although it caused more of the problem, this State may be asked to sacrifice comparatively less to achieve the solution. EPA might argue that from a policy perspective it makes sense to adopt a single overall clean-up method, without regard to State boundaries or who caused the problem. But this

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[6] Of course, Indiana has an effect on other downwind non-attainment areas besides New York. But, under the correct interpretation of the statute, Indiana's responsibility for NOx reductions should be based on the actual amounts of contributions to the ozone problems in New York or another State, not on an amount calculated by a cost-effectiveness standard disconnected from the actual contribution.

policy approach is not what the Act contemplates. Instead, the Act is structured to require each State and its industries to bear their share of the clean-up costs, in proportion to the extent that they actually contributed to the problem in the first place. While each State may reduce its own emissions as inexpensively as possible, no State may evade its share of responsibility simply because it is cheaper to reduce overall emissions elsewhere. As long as the downwind problem is to be solved—as the Act requires—then it was an appropriate judgment for Congress to make that each State will contribute to the solution in proportion to its contribution to the problem. Whatever its preferred policy approach, EPA is not entitled to overrule this congressional judgment.

III. A Federalism-Sensitive Interpretation of the Act is Consistent with the Proper Resolution of the Question Pending in *American Trucking Associations v. Browner*.

In *American Trucking Associations v. U.S. EPA*, 195 F. 3d 4 (D.C. Cir. 2000), *cert. granted*, No. 99-1257 (May 22, 2000) and No. 99-1426 (May 30, 2000) *(ATA)*, the State of Ohio, like many other parties, is urging the Court to adopt an interpretation of the Act that permits EPA to consider costs, as well as benefits, when setting an air-quality standard. Specifically, in *ATA*, we argue that, at least with respect to "non-threshold" pollutants (for which there is no health-related reason for a permissible level above zero), consideration of costs, as well as benefits, is necessary to enable EPA to articulate an intelligible basis for choosing a particular level of permissible emissions as the controlling national standard. As we observe in our briefs in that case, the language of the Act (Section 109 specifically) is susceptible to this reasonable, common-sense interpretation, which has the added virtue of avoiding a constitutional challenge to the Act on "non-delegation" (and perhaps also due process) grounds.

The federalism-sensitive interpretation of the Act that we propose here is consistent with the interpretation of the Act we advance in *ATA*. In both cases, we argue that considerations of cost-effectiveness should be a secondary factor, subordinate to primary considerations identified in Act, namely health-related factors under Section 109 and air-quality factors under Section 110. When EPA sets a national air-quality standard under Section 109, public health should be the primary consideration (in keeping with the overall purpose of the Act), but costs should be a permissible secondary consideration insofar as considering health benefits alone is necessarily indeterminate and untenable. Likewise, when EPA determines how much each State must reduce its emissions that "contribute significantly" to downwind pollution, the primary factor should be the actual amount of emissions that each State sends downwind, with cost-effectiveness a secondary consideration, to determine how each State will achieve the reduction necessary to rectify its share of the problem.[7]

This construction of the Act should not be difficult to understand or implement. The idea of one factor having a priority over another (subordinate) factor in a decision-making process is well-established. *Cf.* John Rawls, *A Theory of Justice* (1971) (arguing that liberty should have a priority over utility). Here, we argue that, properly construed in light of the Act's basic structure and purpose, Section 110 should be construed to require EPA, first, to identify (to the extent feasible) the measurable effect that each State has on downwind pollution, and then require each State to reduce it emissions in proportion to its share of the overall measurable effects. After making this calculation, EPA then may consider cost-effectiveness in requiring each State to adopt the

---

[7] We wish to make clear that we do not argue that costs cannot be considered at all when EPA assesses the adequacy of a State's plan for reducing NOx emissions.

most efficient means of pollution reduction within its borders. This two-step decision-making process is neither unintelligible nor unreasonable in light of the overall structure and purpose of the Act. Rather, it is EPA's interpretation, which permits States with large downwind emissions to avoid a proportional share of the clean-up costs, that is unreasonable given the inherent federalist premises of the Clean Air Act.[8]

IV. The Question Here Requires This Court's Review.

The novel question of statutory construction that this case presents is of a magnitude and scope as to require this Court's review. Moreover, the case finds a number of States lined up on either side of the issue, as some States benefit from one interpretation while other States from another. This kind of dispute among several States is a category of case in which the Framers anticipated that this Court would exercise jurisdiction. (It only adds to the case that an agency of the United States is also directly involved in this dispute among the several States.)

The Constitution, in Article III, specifies that this Court has original jurisdiction in those cases where a State is a party. While this original jurisdiction is non-exclusive and, here, the court of appeals clearly had jurisdiction to review EPA action under 42 U.S.C. §7607(b), the character of this case and the analogy of original jurisdiction indicate that it is an appropriate case for the exercise of certiorari jurisdiction. In particular, the specific problem of interstate transport of pollution, as well as the fact that States are opposed to one another

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[8] Because of the relationship between the question of statutory interpretation in this case and the issues in *ATA*, the Court may wish to defer consideration of this petition as well as the others in this case until it has issued its decision in *ATA*.

concerning the allocation of responsibility for solving this problem, distinguishes this case from many questions arising under the Clean Air Act. While other issues under this Act may be left to the court of appeals, this one deserves the plenary review of this Court.

Indeed, throughout the Nation's history, disputes among the States concerning borders and natural resources have been a primary category of case in which this Court has exercised its original jurisdiction. *See* R. Stern *et al.*, *Supreme Court Practice* 462 (7th ed. 1993). The dispute in this case—concerning the flow of air pollution downwind from some States to another—is a modern-day version of the border and natural-resource disputes for which this Court's original jurisdiction was designed. When this point is added to the fact that the question presented here is a general and novel one of statutory interpretation, rather than being simply the application of settled precedents to a particular fact pattern, it is evident that this case is especially deserving of this Court's review.[9]

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[9] It would be consistent with this point if the Court determines that the question in this case would benefit, at least initially, from further consideration by the court of appeals in light of the interpretation of the Clean Air Act that this Court renders in *ATA*, and on this basis vacate and remand the court of appeals' decision.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 00-632 and 00-633

In The Supreme Court of the United States

Supreme Court, U.S.
FILED
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STATE OF MICHIGAN, *et al.*,
Petitioners,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATES OF OHIO AND INDIANA,
Petitioners,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENTS COUNCIL OF INDUSTRIAL BOILER OWNERS, WEST VIRGINIA MANUFACTURERS ASSOCIATION. MICHIGAN MANUFACTURERS ASSOCIATION AND VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION

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Nos. 00-632 and 00-633

In The Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
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BRIEF OF RESPONDENTS COUNCIL OF INDUSTRIAL BOILER OWNERS, WEST VIRGINIA MANUFACTURERS ASSOCIATION, MICHIGAN MANUFACTURERS ASSOCIATION AND VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION

DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, parties joining this brief have no parent corporations nor are owned by 10% or more by a publicly held company.

STATEMENT

Respondents Council of Industrial Boiler Owners ("CIBO"), West Virginia Manufacturers Association ("WVMA"), Michigan Manufacturers Association ("MMA"), and Virginia Manufacturers Association (" VMA") support the petition of the States of Michigan, West Virginia, South

Carolina, Alabama and the Commonwealth of Virginia (No. 00-662) and the petition of the States of Ohio and Indiana (No. 00-663) for a writ of certiorari to review the ruling of the United States Court of Appeals for the District of Columbia Circuit in *Michigan v. United States Environmental Protection Agency,* 213 F.3d 663 (D.C. Cir. 2000). Some of the Respondents have filed a brief in support of the petition challenging the same ruling filed by Appalachian Power Company, *et al.* (No. 00-445).

As Respondents pointed out in their brief supporting the earlier-filed petition, the Environmental Protection Agency ("EPA") rule at issue in these cases effectively charges industrial sources with violations of Section 110 the Clean Air Act, 42 U.S.C. §7410(a)(2)(D), yet the basis for the violations is an extra-statutory construct that conflicts with longstanding precedent. Respondents are concerned that if the ruling in *Michigan v. EPA* stands, EPA will be encouraged to ignore, where expedient, the plain meaning of the Clean Air Act and impose its own "short-cut" interpretation of the statute. Likewise, Respondents are concerned that the ruling left standing will permit EPA to bypass congressional directives regarding when and how regulatory costs should be considered, and impose instead the agency's own judgment. Further, Respondents agree with State Petitioners that EPA's approach has deprived states of the prerogative to determine how to achieve any necessary emissions reductions.

The rule significantly impacts the industrial sector in a manner that Respondents believe Congress did not intend by imposing a burden to reduce emissions based on the cost of controls, rather than the actual emissions contribution of the source or other sources in a given state to another state.

For these reasons and for those expressed in Respondents' brief filed in support of Petition No. 00-445, Respondents urge this Court to grant certiorari in these cases.

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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

-and-

STATE OF MICHIGAN, *et al.*,
Petitioners,

-and-

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS NEW YORK, CONNECTICUT, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND AND VERMONT IN OPPOSITION TO PETITIONS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Environmental Protection Agency (EPA), in allocating equitably the burden of emission reductions among "upwind" States found to contribute significantly to "downwind" States' nonattainment of the National Ambient Air Quality Standard (NAAQS) for ozone pursuant to section 110(a)(2)(D) of the Clean Air Act, is allowed to consider the relative cost to each upwind State of emission reductions after first determining which States are significant contributors based solely on air quality factors.

2. Whether the court below correctly held that EPA's exercise of its administrative authority to identify the upwind States with emission levels that contributed significantly to nonattainment of NAAQS in downwind States and determine the amount of emission reductions required of upwind States did not violate the non-delegation doctrine.

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The States of New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and Vermont (collectively, the "respondent States") oppose the petitions for certiorari filed by petitioners Appalachian Power Company, *et al.* (hereinafter "Industry petitioners"), State of Michigan, *et al.* (hereinafter "Michigan") and State of Ohio, *et al.* (hereinafter "Ohio"). The petitions seek review of the March 3, 2000 judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the bulk of EPA's NO_x SIP Call rule (the "Rule"). *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Rule*, 63 Fed. Reg. 57356, *et seq.* (1998). For the reasons set forth below, the petitions should be denied, thereby allowing timely implementation of the Rule and enabling the downwind States to meet their statutory obligation to ensure that their residents breathe clean air.

COUNTERSTATEMENT OF THE CASE

In 1998, EPA promulgated the NO_x SIP Call, which requires that twenty-two States and the District of Columbia revise their State Implementation Plans (SIPs) to reduce emissions of nitrogen oxides (NO_x). The Rule was based on overwhelming evidence, undisputed in this case, that emissions of NO_x pollution from numerous sources in many States in the eastern half of the United States contribute to harmful levels of ozone, a pollutant that causes respiratory distress, in many portions of the eastern United States. *See* 63 Fed. Reg. at 57377. Recognizing that many States would have difficulty in achieving the National Ambient Air Quality Standard (NAAQS) for ozone without reductions in the incoming pollution levels, EPA exercised its authority

under section 110 of the Clean Air Act (the "Act") to require emission reductions in all States that contribute to the problem of transported ozone pollution. Implementation of the NO_x SIP Call will ensure that residents of much of the eastern half of the nation, including but not limited to residents of the respondent States, will obtain the benefits of clean air within the timetable set by Congress in the 1990 amendments to the Act.

A. Statutory and Regulatory Background: Establishing and Maintaining the NAAQS

Under sections 108 and 109 of the Act, EPA is responsible for identifying the pollutants that are harmful to public health when present in the ambient air and for establishing the ambient levels of such pollutants that the States are required to achieve. The Act requires EPA to set NAAQS for these "criteria pollutants" at levels that are "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). Under long-standing EPA practice and the holdings of the D.C. Circuit, EPA is to set the NAAQS without regard to the economic ramifications of the levels chosen. *See American Trucking Assns. v. EPA*, 175 F.3d 1027, 1038, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 120 S. Ct. 2193 (2000) (*ATA*); *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).[1] EPA set the NAAQS for ozone at issue in this case in 1979. *See* 44 Fed. Reg. 8202 (1979).

Section 110 of the Act requires each State to submit to EPA a SIP that provides for the attainment of the NAAQS

1. The continuing validity of this principle is being reviewed by the Court in *ATA*.

within the State. The SIP must demonstrate how State regulations will result in the emission reductions necessary to achieve the NAAQS. This Court has held that technical or economic infeasibility does not excuse a State from its obligation to achieve acceptable air quality for its citizens. *See Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

Congress recognized, however, that a State may be prevented from attaining the NAAQS, or at least hampered in its efforts to do so, by pollution transported from other States. Accordingly, just as section 110(a)(2)(A) requires each State to submit a plan to attain the NAAQS, section 110(a)(2)(D) requires each State's plan to ensure that emissions activities within its borders do not "contribute significantly" to nonattainment downwind. This obligation is "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, reprinted in *A Legislative History of the Clean Air Act Amendments of 1977* (1978) at 1416 (the "1977 Senate Report").

B. Transported Ozone Pollution and the NO_x SIP Call

In promulgating the Clean Air Act Amendments of 1990, Congress recognized that regional control strategies were still needed to address the migration of ozone and its precursors:

> The bill reflects an increasing understanding of how ozone pollution is formed and transported. Because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels.

S. Rep. No. 101-228 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3389, 3399. To develop a regional control strategy for attaining the NAAQS across the eastern half of the United States, all States east of the Rocky Mountains (including the District of Columbia) participated in the working group known as the Ozone Transport Assessment Group (OTAG), which tried to craft a solution to the problem of transported ozone. Although the participating States endorsed OTAG's extensive and sophisticated technical analyses and recognized that region-wide NO_x reductions were needed, the divergent interests of the OTAG States prevented them from agreeing on the details of a control strategy, including the level of NO_x reductions required. In general, the northeastern States, which are downwind of the bulk of the NO_x emission sources, advocated more stringent controls than Ohio, Michigan and the other States joining in the petitions for certiorari, which are host to many of the large NO_x emission sources.

In the absence of a State consensus on all the elements of a NO_x control program, EPA used OTAG's data and analyses to develop the NO_x SIP Call, the rule at issue here. In doing so, EPA evaluated the contribution of NO_x emissions in thirty-seven States east of the Rocky Mountains to ozone noncompliance in a number of eastern, southern and midwestern locations, including the New York City metropolitan area and other urban areas along the eastern seaboard, the Atlanta, Birmingham, Chicago, Cincinnati, Louisville, Pittsburgh and St. Louis metropolitan areas, and southwestern Michigan. *See* 63 Fed. Reg. at 57387. Given the number of source and receptor regions, EPA had to consider hundreds of source/receptor combinations. Using advanced air quality modeling techniques, EPA identified twenty-two States and the District of Columbia as "significant

contributors" to ozone nonattainment in other States, based on its evaluation of the magnitude, frequency and relative amount of each State's contribution to ozone non-attainment in downwind States. *See* 213 F.3d at 675. EPA determined that each of these States was making a significant contribution to ozone nonattainment in at least two other States and, in many cases, in numerous downwind States in different directions and at different distances from the upwind State. *See* 63 Fed. Reg. at 57394, Table II-4.[2] For example, EPA found that Indiana contributes significantly to ozone nonattainment in a number of eastern seaboard areas such as New York City and Baltimore, as well as to the nonattainment problems in Southwestern Michigan (to the north), Cincinnati (to the southeast), Louisville (to the south), and Chicago (to the northwest). Indiana's contribution ranged from an average of 17% to Louisville's ozone levels, 11% to Cincinnati's, 10% to southwestern Michigan's and 9% to Chicago's, to average contributions in the range of 1-2% to ozone levels in eastern seaboard locations.[3]

Once it identified the twenty-three jurisdictions that were significant contributors to at least two downwind ozone nonattainment areas, EPA determined the amount by which each State's NO_x emissions should be reduced to mitigate its significant contribution to numerous downwind States.

2. With the exception of Tennessee, West Virginia and the Carolinas, each of the States identified as significant contributors contains at least a portion of a nonattainment area within its borders.

3. Detailed listing of the contributions to downwind nonattainment of each of the twenty-three jurisdictions subject to the Rule are contained in the *Air Quality Modeling Technical Support Document for the Regional NO_x SIP Call* (September 21, 1998) (which is part of the record before the court below) and summarized at 63 Fed. Reg. at 57387-99.

In so doing, EPA recognized that each upwind State contributes in varying degrees to ozone nonattainment in several downwind States and that each nonattainment area's ozone originated in a number of upwind States. Thus, rather than requiring an upwind State to reduce its emissions by different amounts for each downwind area affected by its emissions, EPA determined that a single level of emission reduction would mitigate the impact of that State's emissions on all downwind States. EPA decided to require only the level of emission reductions that could be obtained in a highly cost-effective manner — that is, at a cost of $2000 per ton or less. *See* 213 F.3d at 675. Rather than requiring each State that contributed significantly to downwind nonattainment to eliminate all its NO_x emissions, EPA concluded that it is fair and consistent with the Act to require upwind States "to reduce *at least* the portion of their emissions for which highly cost-effective controls are available." 63 Fed. Reg. at 57379.

EPA based the $2000/ton figure on "$NO_x$ emissions controls that are available and of comparable cost to other recently undertaken or planned NO_x measures," including "the types of controls EPA and States have needed to adopt most recently because their previous planning efforts have already taken advantage of opportunities for even cheaper controls." *Id.* at 57400. In other words, the $2000/ton figure was based on the costs of controls already being incurred in the downwind States that are burdened by ozone transport. EPA explained that its selection of the $2000/ton criterion was a "first approximation" at determining the level of controls that should be required of upwind sources to eliminate significant contributions to downwind nonattainment and that further reductions may be required in the future if needed to achieve regional ozone nonattainment. *See id.* at 57399.

On the basis of additional modeling, EPA determined that the emissions reductions achieved through application of highly cost-effective measures throughout the region would allow nonattainment areas to make "appreciable progress towards attainment," but would not require more reductions in upwind States than necessary to achieve attainment in all downwind areas affected by those States' emissions. *Id.* at 57379, 57386 n.38, 57389-391. Thus, without requiring any States to implement unduly costly control requirements, the Rule enables all States in the eastern half of the United States to obtain the benefits of clean air for their residents.

C. The Decision of the Court of Appeals

The Rule was challenged by numerous utilities and businesses and by several midwestern and southern states. On March 3, 2000, the Court of Appeals issued its decision upholding the bulk of the NO_x SIP Call. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The court first upheld EPA's use of complicated air quality modeling in identifying States as significant contributors. *See id.* at 673-74. It then determined that EPA did not err in using costs in determining the amount of emission reductions required from each State that had been found to contribute significantly to downwind nonattainment. In so doing, the court relied upon its own longstanding precedent that an agency may consider costs unless there is a "clear congressional intent to preclude consideration of cost." *Id.* at 678 (quoting *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)). The court concluded that the phrase "contribute significantly" in section 110(a)(2)(D) does not express a clear congressional intent to exclude consideration of cost. *See id.* at 679. Without actually determining that the phrase

"contribute significantly" *requires* consideration of costs or equitable factors, the court noted that it would be difficult to draw a line between the level of emissions that are permissible and those that are not without considering costs and other equitable factors. *See id.* at 678. The court below also rejected several other arguments, including a nondelegation challenge. *See id.* at 680-81.[4]

Petitions for rehearing and rehearing *en banc* were denied on June 22, 2000.

REASONS FOR DENYING THE WRIT

None of the petitioners disputes the public health dangers associated with high levels of ozone pollution. Nor do petitioners contest EPA's conclusion that the ozone attainment problems throughout the eastern half of the nation result from emission activity at hundreds of large and small sources of NO_x emissions across the region or its finding that each source State individually contributes to NAAQS non-attainment in numerous downwind States in widely differing amounts. Furthermore, the petitioners agree that EPA has authority under section 110 to require upwind States to revise their SIPs to mitigate their contribution to downwind ozone nonattainment.

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4. The D.C. Circuit did vacate certain aspects of the Rule. It determined that Wisconsin should not have been included in the Rule and that the emission reductions required of Georgia and Missouri should be based solely on the emissions from the portions of those States found to contribute to downwind nonattainment. *See* 213 F.3d at 681-85. It also determined that EPA did not provide sufficient notice of the definition of an electric generating unit and of the control level assumed for large stationary internal combustion engines. *See id.* at 691-94.

Instead, the petitioners' only complaint is with the level of emission reductions required in Ohio, Michigan and the other petitioning States. They claim that EPA misconstrued the term "contribute significantly" in section 110(a)(2)(D) of the Clean Air Act by including costs of controls among the factors considered in determining the amount of emission reduction required of each State that contributes to regional ozone pollution. Although Ohio tries to inflate the importance of the issue by suggesting that EPA's analysis is not "federalism-sensitive," this issue involves routine administrative application of a statutory standard that does not merit review by this Court. In fact, although the various petitioners do not agree on the reasons why EPA's consideration of costs violated the Act, some of them recognize that costs can play a role in the analysis and argue that EPA erred not in considering costs at all, but in the way it considered costs. *Industry Pet.* at 12; *Ohio Pet.* at 10-11.[5]

5. Michigan adheres to the position that costs should play no role in the analysis, despite acknowledging that the case on which it chiefly relies, *Union Electric*, *supra*, recognizes a role for consideration of costs under section 110. *Michigan Pet.* at 9 n.4.

I.

THE CLEAN AIR ACT AND DECISIONS OF THIS COURT PERMIT EPA'S CONSIDERATION OF COST-EFFECTIVENESS IN IDENTIFYING THE EMISSION REDUCTIONS REQUIRED OF EACH STATE.

A. The Court of Appeals' Decision is Not Inconsistent with Decisions of this Court and the D.C. Circuit Prohibiting the Consideration of Costs in Other Contexts.

Section 110(a)(2)(D) does not specify how EPA should determine what emissions make a significant contribution to downwind States. It does not say that cost-effectiveness of controls or other economic factors are relevant considerations. Nor does section 110(a)(2)(D) preclude the consideration of cost-effectiveness of controls in determining the amount of excess emissions in each State. Accordingly, the Court of Appeals acted properly in concluding that EPA may consider the costs of controlling emissions in determining whether the risk posed by the emissions is significant. *See* 213 F.3d at 677-78 (citing *International Union, UAW v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994), and Breyer, *et al.*, *Administrative Law and Regulatory Policy* 65 (4th ed. 1999)).

Both the State petitioners and the Industry petitioners misconstrue the role of costs in EPA's analysis. They attempt unsuccessfully to demonstrate an inconsistency between the D.C. Circuit's decision in this case, which upholds EPA's consideration of costs for the limited purpose of allocating the burdens of emission reductions, and decisions of this Court and the D.C. Circuit addressing EPA's use of cost considerations in unrelated contexts.

1. Industry petitioners' attempt to create the appearance of an inconsistency with other D.C. Circuit cases does not provide a basis for certiorari.

The Industry petitioners' argument that the Court of Appeals' decision is inconsistent with prior D.C. Circuit cases does not support the grant of certiorari in this case. As an initial matter, an alleged conflict between decisions of the D.C. Circuit does not provide a basis for certiorari. Conflicts between decisions of a single court of appeals should be addressed through petitions for rehearing *en banc*, rather than through certiorari. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974) (referencing earlier petition for certiorari that had been denied when conflict was between decisions of the same Circuit); *see also* Stern, *et al., Supreme Court Practice* 176 (7th ed. 1993). Petitioners' suggestion that an inter-circuit conflict over a Clean Air Act issue cannot possibly arise because the D.C. Circuit has sole jurisdiction over appeals of actions and administrative proceedings under the Act (*Michigan Pet.* at 19) is not only irrelevant but simply wrong. EPA's administrative determinations regarding the compliance of SIPs with the requirements of section 110(a)(2)(D) are generally reviewed in the circuit for the state whose SIP is being challenged. *See* 42 U.S.C. § 7607(b). In fact, the challenge to the Missouri SIP in *Union Electric*, upon which Michigan relies, was heard by the Eighth Circuit, not the D.C. Circuit. *See* 427 U.S. at 252-53.

Furthermore, the decisions on which Industry petitioners rely are inapposite to the present case. In *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995), the D.C. Circuit held that a regulation that allowed EPA to prohibit a fuel additive only if it "cause[d] or contribute[d] to failure of any emission

control device" did not provide EPA with the authority to bar the additive on the entirely unrelated ground that it may cause adverse health effects. Likewise, in *American Petroleum Institute v. United States EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("*API*"), EPA improperly promulgated fuel content regulations that were directed at promoting the use of renewable fuel sources, rather than at reducing emissions of volatile organic compounds and toxic air pollutants, as required by Congress. These decisions interpreted statutes clearly barring the use of factors that had been erroneously applied by EPA, whereas in this case section 110(a)(2)(D) does not bar the consideration of costs. In fact, EPA's consideration of the relative costs of controlling emissions is consistent with Congressional intent that the burden of controlling interstate pollution be shared by all States that contribute to the problem. *See 1977 Senate Report* at 1416.

Nor did EPA's rule subordinate air quality factors to considerations of cost-effectiveness. Industry petitioners overstate the role of costs in EPA's determination when they contend that EPA "considered as its sole factor the cost-effectiveness of emission reductions in determining whether one state's contribution to another state's ozone nonattainment air quality is 'significant.' " *Industry Pet.* at 13. In fact, as the State petitioners recognize, EPA's determination of whether a State contributed significantly to downwind nonattainment was based solely on air quality factors, with costs playing a role only in determining the amount of emissions to be reduced. *Michigan Pet.* at 5-6; *Ohio Pet.* at 4-5.[6]

6. If Industry petitioners were right that cost of compliance was the sole factor considered by EPA, the Rule would have encompassed all thirty-seven States included in OTAG, rather than just the twenty-

(Cont'd)

Ultimately, Industry petitioners concede that EPA may consider the relative costs of controls in determining the NO_x reductions required of each State, albeit under section 110(k)(5) of the Act rather than section 110(a)(2)(D). *Industry Pet.* at 18. This distinction, however, has no basis in the language of the statute, because, like section 110(a)(2)(D), section 110(k)(5) contains no specific reference to the consideration of costs. If such consideration of costs is valid, it is equally valid under both provisions.

2. Michigan's argument that the Court of Appeals' decision is contrary to this Court's holdings in *Union Electric Co.* and the holding of the D.C. Circuit in *Lead Industries Association* should be rejected because it misconstrues those cases and was not properly preserved for this Court's consideration.

Michigan's primary argument, that prior decisions under sections 109 and 110 of the Act prohibit EPA from considering costs in setting the NAAQS and in reviewing SIPs for compliance with those NAAQS, was not presented to the court below. The cases upon which Michigan now relies — *Lead Industries Association* and *Union Electric* — are cited nowhere in the Brief or Reply Brief filed below by Michigan and other upwind States. The explanation for that omission is simple: the premise of both *Union Electric* and *Lead Industries Association* — that costs and economic

(Cont'd)
two States and the District of Columbia that were ultimately included in the Rule. In fact, those twenty-three jurisdictions were included because the impact of their emissions on downwind States exceeded a certain air quality threshold, not because they contained sources that could be controlled at a cost of less than $2000 per ton.

factors cannot be used to weaken the public health protection provided by the NAAQS — is inconsistent with Michigan's position before the Court of Appeals, where it argued that the emission reductions required by the NO_x SIP Call were more extensive than needed. *See, e.g. Reply Brief of Petitioning States* at 11-12. Now, in an effort to take advantage of the *Union Electric* and *Lead Industries Association* holdings, Michigan shifts gears, suggesting — without any basis in the record and contrary to the results of EPA's modeling — that EPA's consideration of costs somehow weakened the public health protections of the Act.[7]

As an initial matter, this Court should reject Michigan's argument as a basis for *certiorari* because the argument was neither presented to EPA during the public comment process, as required by CAA section 307(d)(7)(B),[8] nor made to the court below. *See, e.g. Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (refusing to consider propriety of award of costs because that issue was not raised in the court of appeals). In fact, Michigan and its co-petitioners were participants in OTAG, which recommended that cost-effectiveness of controls be included as one of the criteria for selection of a strategy to reduce transported ozone. *See* 63 Fed. Reg. at 57363.

In any event, there is no conflict between the decision below and decisions considering the use of costs to reduce

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7. Notably, Ohio (the lead upwind State in the D.C. Circuit proceedings) and Indiana do not join Michigan in this new argument.

8. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review."

protections against unhealthy air under other provisions of the Clean Air Act. EPA's consideration of costs did not reduce the level of public health protection at all; in fact, the Rule's emission reduction requirements are the most stringent of the range of possible reductions identified by OTAG. Instead of using cost considerations to reduce public health protection, EPA used relative costs of NO_x reductions to allocate equitably the emission reductions needed to achieve the preexisting public health goal of attainment of the NAAQS. Thus, in the present case, unlike the decisions on which Michigan relies, the consideration of costs is consistent with, rather than contrary to, Congress' intent to protect the public from the adverse health effects of poor air quality.

In *Lead Industries Association,* the D.C. Circuit held that EPA could not, in setting the health-based primary NAAQS, consider the economic feasibility of attaining the NAAQS. The court held that the language of section 109 evidenced a clear Congressional intent that the NAAQS should be set solely on the basis of the need to protect public health. The court emphasized that the NAAQS are intended to be "technology-forcing," meaning that Congress understood and intended that industry would have to develop new technologies, at potentially great cost, to achieve the NAAQS. *See* 647 F.2d at 1149. Similarly, in *Union Electric*, this Court found that EPA need not consider the feasibility of compliance with a SIP in evaluating the sufficiency of a SIP under section 110 of the Act. In that case, Union Electric, an electric utility located in Missouri, challenged EPA's approval of the Missouri SIP on the ground that compliance with the emission limitations contained in the SIP was not technologically and economically feasible. The Court held that EPA may not allow claims of economic and technological

feasibility to excuse a State from submitting a SIP that promotes attainment of the health-based NAAQS. *See* 427 U.S. at 265. Notably, however, the Court recognized that economic factors may be considered as long as "consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards." 427 U.S. at 266.

In the present case, by contrast, EPA's consideration of costs does not interfere with the prompt attainment of the national air quality standards. Congress' goal, as in *Lead Industries Association* and *Union Electric*, is attainment of NAAQS by specific dates. EPA set the requisite ozone NAAQS without regard to economic factors, and EPA's consideration of costs does not reduce the protection provided by the NAAQS to downwind States and their residents. To the contrary, EPA's modeling confirmed that the emission reductions required by the Rule, after consideration of costs, will enable downwind States, including some of the State respondents, to make significant progress towards attainment of the NAAQS.[9] *See* 63 Fed. Reg. at 57379. The costs of reducing NO_x emissions to achieve these NAAQS were considered only in allocating the burden of reducing NO_x emissions among the various States that contribute to ozone

9. EPA recognized that the downwind States may have to bear an additional burden in attaining the NAAQS because the emission reductions required by the NO_x SIP Call are sufficient to put the NAAQS within reach of all States, but may be insufficient to bring about attainment of the NAAQS in all locations without any further reductions from the downwind States. Of course, EPA could have provided for attainment by raising the cost cut-off from $2000 to a higher level, perhaps $2500. It is the downwind States that support the Rule that may have to implement the higher level of controls themselves, not upwind States like Michigan.

nonattainment in the eastern United States, thereby effectuating Congress' intent to apportion equitably the burden of emission reduction efforts. Far from "interfer[ing] with the primary congressional purpose of prompt attainment of the national air quality standards," the NO_x SIP Call rule makes such attainment possible throughout the eastern portion of the United States without requiring any unneeded emission reductions.[10] In the absence of this Rule, regions that are home to millions of Americans will not achieve the NAAQS within the timetable set by Congress. *Id.* at 57363.

B. The Upwind States' Argument that the NO_x SIP Call Rule Violates Principles of "Federalism" and "State Sovereignty" is Meritless and does not Provide a Basis for Certiorari.

The State petitioners contend that EPA misallocated the burden of emission reductions among the States. Michigan and Ohio (and their co-petitioners) evidently believe that EPA's method of apportioning the burden of compliance in accordance with the costs of controlling the emissions results in sources in those States bearing a greater share of emission reductions than they would like. In an attempt to disguise their challenge to EPA's method as a subject that might merit

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10. EPA's use of costs in this case is similar to the waiver process approved by this Court in *Union Electric*. The Court determined that States are free to exempt facilities or industry groups from control requirements under the SIP on grounds of economic infeasibility so long as doing so does not interfere with attainment of the NAAQS. *See* 427 U.S. at 266-67. Likewise, here EPA is free to exclude sources that cannot be controlled in a highly cost-effective manner from its calculation of State budgets, as long as doing so does not interfere with attainment of the NAAQS.

this Court's review, Ohio contends, without supporting its position and without citation to case law, that EPA's application of section 110 is somehow inconsistent with unspecified principles of "federalism" or "state sovereignty."

Underlying this argument is the State petitioners' failure to recognize that each upwind State contributes to varying degrees to numerous downwind States. For example, State petitioners note that Indiana and Pennsylvania are being required to reduce their emissions by approximately the same amount, even though Pennsylvania's impact on the downwind New York City nonattainment area is greater. *Ohio Pet.* at 12-13; *Michigan Pet.* at 22-23. The State petitioners ignore, however, that Indiana emissions have a much greater effect than Pennsylvania emissions on other nonattainment areas that are closer to Indiana, such as Louisville (to which Indiana contributes an average of 17% of the ozone and Pennsylvania less than 1%), Cincinnati (Indiana 11%; Pennsylvania 1%), Southwestern Michigan (Indiana 10%; Pennsylvania less than 1%) and Chicago (Indiana 9%; Pennsylvania less than 1%). Thus, shifting the focus from New York City to Cincinnati, Chicago or Louisville as a receptor area would mean that it is Pennsylvania, rather than Indiana, that is being required to obtain excess emission reductions under the Rule. Considering that each upwind State contributes varying amounts of ozone to numerous downwind States, EPA's approach recognizes the impossibility of requiring that a State reduce its emissions by different amounts for each downwind State to which it contributes.

Ultimately, EPA's allocation methodology follows from its recognition that nonattainment throughout the eastern half of the United States is the result of the collective contribution

of countless sources throughout the area, a finding that is being challenged by none of the Petitioners. In light of the regional nature of the ozone nonattainment problem, the Rule effectuates Congressional intent to allocate the burden of compliance among the States containing sources that contribute to the problem. Notwithstanding State petitioners' attempt to disguise their challenge as a defense of federalism, their argument that EPA could or should have allocated the emission reductions differently does not implicate principles of State sovereignty.

II.

THE COURT BELOW CORRECTLY REJECTED PETITIONERS' NONDELEGATION ARGUMENTS.

The Industry petitioners' effort to obtain review of the D.C. Circuit's nondelegation holding fails for several reasons. First, and most fundamentally, the delegation at issue in this case is narrower than the broad delegations that have been upheld by this Court. *See, e.g. Touby v. United States*, 500 U.S. 160 (1991); *United States v. Mistretta*, 488 U.S. 361, 371-72 (1988); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Yakus v United States*, 321 U.S. 414 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943).

Second, the Court of Appeals correctly concluded in this case that the nondelegation doctrine does not require as precise a delegation when the agency action is of more limited scope than a broad legislative rule of nationwide application. In this case, in exercising its authority under section 110(a)(2)(D), EPA did not issue a quasi-legislative rule, but

rather made quintessentially administrative, fact-specific determinations regarding dozens of state-to-state comparisons:

> [A]s a practical matter EPA must make a number of threshold determinations that in practice appear to have confined the statute to a modest role. Before assessing "significance," EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment.

213 F.3d at 680. *See also* H.R. 95-294, 330 95th Cong. 1st Sess., reprinted in 4 *A Legislative History of the Clean Air Act Amendments of 1977*, 2797 (1978) (describing the interstate transport provisions of the Act as "a Federal mechanism for resolving disputes which cannot be decided through cooperation and consultation between the States or persons involved"). Congress' delegation of authority to make this type of fact-specific, case-by-case determination does not implicate the non-delegation doctrine, which bars only the delegation of *legislative* power. *See Touby*, 500 U.S. at 165 (the nondelegation doctrine means "that Congress may not constitutionally delegate its legislative power to another branch of government.").

Recognizing the limitations of the legislative process, this Court's precedent establishes that administrative agencies must have ample leeway to apply Congress' policy choices on a case-by-case basis, as EPA did in this case. In *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), this Court recognized that Congress cannot oversee the application of its policy choices to all the specific factual circumstances that may arise:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

329 U.S. at 105. *See also SEC v. Chenery*, 332 U.S. 194, 202-03 (1947) ("the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940) (referring to the need for the agency to use its expertise in applying the policy expressed in a statute to particular factual circumstances).

Indeed, the D.C. Circuit understood in *ATA* that EPA's exercise of its authority to review efforts to implement NAAQS, as in this case, did not implicate the same non-delegation concerns as the establishment of the NAAQS. In *ATA*, the Court of Appeals distinguished the decision of the First Circuit in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), which, like the court below, upheld EPA's authority to determine the steps necessary to achieve a NAAQS against a nondelegation challenge:

> [T]he action challenged in *South Terminal* was EPA's adoption of a plan for ending or preventing

> violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions . . . and the "fairly precise[ly] defin[ed]" goals were the NAAQS themselves.

ATA, 175 F.3d at 1057. As in *South Terminal Corp.*, the action challenged here is EPA's adoption of a plan intended to end violations of the NAAQS. Thus, both courts of appeals to consider the issue have concluded that section 110 does not present a nondelegation problem.[11]

Finally, notwithstanding petitioners' claim that EPA's action is "unfettered by any obligation to obey Congress' proscription against arbitrary and capricious action" (*Industry Pet.* at 20), a reviewing Court is free to evaluate EPA's significant contribution determinations under an arbitrary and capricious standard, after giving due deference to its interpretation of the statute and its technical determinations. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (deferring to agency's interpretation of statute that it was charged with administering). The D.C. Circuit did just that when it rejected EPA's inclusion of Wisconsin and the "coarse grid" portions of Georgia and Missouri in the rulemaking. Accordingly, there is no basis to the petitioners' non-delegation challenges.

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11. Furthermore, the decision in *ATA* upon which petitioners rely was incorrect for the reasons set forth in the briefs filed by the EPA, the northeastern States and other petitioners in *Browner v. American Trucking Ass'ns*, U.S. Supreme Court Nos. 99-1257, 99-1263 and 99-1265 (argued on November 7, 2000). Respondent Massachusetts seeks reversal of the D.C. Circuit's decision in *ATA* as a party in those cases and respondents New York, Connecticut, Maine, Maryland, New Hampshire, Rhode Island, and Vermont have all joined in an amicus curiae brief in those cases, supporting reversal of *ATA*.

CONCLUSION

For all the foregoing reasons, the Court should deny the petitions for certiorari.

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Nos. 00-445, 00-632 and 00-638

In The

Supreme Court of the United States

STATE OF MICHIGAN, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether EPA may, under Sections 110(a)(2)(D) and 110(k)(5) of the Clean Air Act, consider cost as one of several factors in determining the amount of emissions reductions that a state must make to adequately mitigate emissions that are significantly contributing to another state's failure to attain a national ambient air quality standard.

2. Whether EPA's action in considering cost as a factor under Sections 110(a)(2)(D) and 110(k)(5) represents a constitutionally permissible exercise of the authority delegated to EPA by Congress.

PARTIES TO THE PROCEEDINGS

1. The following Parties were petitioners in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection.
In No. 98-1588, State of Ohio.
In No. 98-1596, Commonwealth of Virginia.
In No. 98-1615, State of Alabama, *ex. rel.* Bill Pryor, Attorney General.
In No. 98-1617, State of Indiana and Indiana Department of Environmental Management.
In No. 98-1619, State of North Carolina.
In No. 98-1621, State of South Carolina.
In No. 98-1499, United Mine Workers of America.
In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:
Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.:
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;
Columbus Southern Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;
Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Madison Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company, d/b/a Allegheny Power System, Inc.
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Tail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission Cooperative, Inc.;
Potomac Edison Company, The, d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;
Southern Company:
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Mississippi Power Company;
Savannah Electric and Power Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company, d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;
National Rural Electric Cooperative Association; and
American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri through the Board of Public Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;
St. Joseph Light & Power Company;
The Empire District Electric Company;
Utilicorp United, Inc.;
City of Independence, Missouri; and
Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company.

In No. 98-1585, The Alabama Forestry Association, Inc., by and through its section The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

PARTIES TO THE PROCEEDINGS – Continued

In No. 98-1598, South Carolina Public Service Authority, d/b/a Santee Cooper.
In No. 98-1601, American Municipal Power-Ohio.
In No. 98-1602, Fort James Operating Company;
Gilman Paper Company;
Rayonier, Inc.;
Savannah Electric & Power Company;
Southeast Paper Manufacturing Company; and
International Paper Company.
In No. 98-1608, PP&L, Inc.
In No. 98-1609, Council of Industrial Boiler Owners.
In No. 98-1611, Network for Workable Air Policies.
In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.
In No. 98-1618, Interstate Natural Gas Association of America.
In No. 99-1070, Appalachian Power Company, *et al.*
In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service Corporation; and
Wisconsin Manufacturers & Commerce.

2. The following Party was a Respondent in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

   U.S. Environmental Protection Agency.

3. The following Parties were Intervenors in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

   Natural Resources Defense Council;
   Environmental Law & Policy Center of the Midwest;

PARTIES TO THE PROCEEDINGS – Continued

American Lung Association of Metropolitan Chicago;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund (now referred to as Environmental Defense);
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group; and
Wisconsin's Environmental Decade Institute.

State of New York;
State of Connecticut;
State of Maine;
Commonwealth of Massachusetts
State of New Hampshire;
Commonwealth of Pennsylvania;
State of Rhode Island; and
State of Vermont.

State of Maryland.

State of Wisconsin.

Province of Ontario, Canada;
Norman W. Sterling, Minister of the Environment, Province of Ontario;

PARTIES TO THE PROCEEDINGS – Continued

Charles A. Harnick, Attorney General of the Province of Ontario; and
Christopher Carl Haromy.

Appalachian Power Company, *et al.* (listed in paragraph 1. *supra*).

Dairyland Power Cooperative.

Virginia Manufacturers Association.

South Carolina Public Service Authority, d/b/a Santee Cooper.

Detroit Public Lighting;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency; and
City of Wyandotte Department of Municipal Service.

GPU Generation, Inc.

American Gas Association.

Interstate Natural Gas Association of America.

Network for Workable Air Policies.

Business Council of Alabama.

Michigan Manufacturers Association.

Consolidated Edison Co. of New York, Inc.;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation; and
PG&E Generating.

PARTIES TO THE PROCEEDINGS – Continued

Natural Gas Supply Association; and
Sempra Energy.

Associated Industries of Massachusetts;
New England Council; and
New Jersey State Chamber of Commerce.

PP&L, Inc.;
Atlantic City Electric Company; and
Delmarva Power & Light Company.

4. The following were *Amici* in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

Government of Canada.

North Carolina Citizens for Business and Industry.

South Carolina Chamber of Commerce;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

Toledo Metropolitan Area Council of Governments.

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BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

INTRODUCTION

Three petitions for certiorari have been filed seeking review of portions of a March 3, 2000 decision of the United States Court of Appeals for the District of Columbia ("D.C. Circuit").[1] That decision largely upheld the Environmental Protection Agency's ("EPA's" or the "Agency's") 1998 rule requiring reductions in nitrogen oxide ("NOx") emissions in 22 states and the District of Columbia that EPA found to be "contributing significantly" to the failure of many states in the Eastern United States to attain the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 Fed. Reg. 57,356 (Oct. 27, 1998) (hereinafter "NOx SIP Call Rule" or "Rule"). In particular, the D.C. Circuit held that EPA, in determining the level of emissions that were contributing significantly to downwind nonattainment and thus needed to be reduced, properly considered the costs of controlling those emissions. All three petitions seek review of this finding on the grounds that it violates the Clean Air Act (the "Act"), although Petitioners do not agree on what approach Congress intended EPA to take. The States of Michigan, Alabama, West Virginia, Virginia

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[1] *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) ("*Michigan*"), *reprinted at* Appendix of the Petition for a Writ of Certiorari of Appalachian Power Co., *et al.* (No. 00-445, Sept. 20, 2000) ("Ind. Pet., App.")

and South Carolina ("Michigan") (No. 00-632) assert that EPA cannot consider costs at all. The States of Ohio and Indiana ("Ohio") (No. 00-633), on the other hand, claim that EPA may consider costs, but only as a "subordinate factor."[2] Finally, a group of industries and industry trade associations led by Appalachian Power Company ("Industry" or "Industry Petitioners") (No. 00-445) claim that EPA may not consider costs when determining "significant contribution," but may do so when determining how much of that contribution must be eliminated. Industry Petitioners also claim that EPA's consideration of cost factors violated the so-called "non-delegation" doctrine.

Environmental group intervenor-respondents in the D.C. Circuit case below[3] respectfully submit that none of

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[2] State petitioners below were Ohio, Indiana, Michigan, Alabama, South Carolina, Virginia, West Virginia and North Carolina. These states combined their efforts in briefing and arguing the case before the D.C. Circuit. North Carolina has not filed a petition for certiorari with this Court, and Ohio and Indiana have filed a petition separate from that filed by Michigan, Alabama, South Carolina, Virginia and West Virginia.

[3] Environmental organizations participating as intervenor-respondents in the case below, and who join in this Opposition are: American Lung Association of Metropolitan Chicago, Appalachian Mountain Club, Citizens Action Coalition of Indiana, Clean Air Council, Environmental Defense (formerly known as Environmental Defense Fund), Environmental Law & Policy Center of the Midwest, Group Against Smog and Pollution ("GASP"), Hoosier Environmental Council, Illinois Environmental Council, Izaak Walton League of America, Legal Environmental Assistance Foundation, Michigan Environmental Council, National Environmental Trust, Natural Resources Council of Maine, Natural Resources Defense

these petitions merit this Court's review. There is no conflict between the D.C. Circuit's decision and decisions of this Court or other federal appellate courts. The D.C. Circuit's resolution of the questions presented in the certiorari petitions is amply supported by applicable precedent and is correct.

STATEMENT OF THE CASE

Petitioners' Statements describe EPA's authority to implement the NAAQS for ozone through issuance of a "SIP call" under Clean Air Act Section 110(k)(5), by which the EPA Administrator may find inadequate state implementation plans ("SIPs") and require states to revise such SIPs to correct the deficiencies. 42 U.S.C. § 7410(k)(5). One of the possible bases for a SIP call is an EPA finding under Section 110(a)(2)(D)(i)(I) of the Act that a SIP does not contain adequate provisions to prohibit air pollution in that state "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance [of a NAAQS] by, any other State." 42 U.S.C. § 7410(a)(2)(D)(i)(I). These provisions are designed to ensure that the cumulative impacts of many states' upwind air pollution do not foul the air downwind so badly that any downwind state is forced to bear more than its share of the burden of ensuring that its air does not violate the NAAQS; or alternatively, bear more than

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Council, New York Public Interest Research Group, Ohio Citizen Action, Ohio Environmental Council, U.S. Public Interest Research Group, and Wisconsin's Environmental Decade Institute.

its share of the public health consequences of dirty air. *See* S.Rep. No. 95-127 at 41-42, *reprinted in* 3 A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Leg. Hist.") 1415-16 (Comm. Print 1978).

In the case of the ozone NAAQS, each upwind area contributes to the total ozone burden in downwind areas in many states. 63 Fed.Reg. 57,356, 57,394-396, Tables II-4 to II-7. Put another way, because of the nature of ozone pollution and its transport, the pollution in any upwind area will impact the area and the state immediately downwind as well as more distant states.

Ozone is formed when NOx and volatile organic compounds ("VOCs") interact in the presence of sunlight. Once ozone has been created, it drifts downwind, along with its NOx precursor (VOCs are very localized in their effects, and are not transported with the air mass to any great extent). *Id.* at 57,381. The D.C. Circuit has correctly recognized that "as the air mass moves [downwind], ozone levels often continue to increase, in part because ozone has more time to develop, in part because the air mass picks up more precursors along the way. Ultimately, this process can bring high ozone levels to areas hundreds of miles downwind of the pollution sources." *Virginia v. EPA*, 108 F.3d 1397, 1400, *modified on reh'g on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). The creation of downwind ozone pollution therefore is non-linear and cumulative.[4] For each separate meteorological ozone

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[4] Petitioners argue that NOx, the precursor chemical primarily associated with transported ozone, both creates and destroys ozone. Ind. Pet. at 8 & n. 4. This statement is incorrect – although strictly localized increases in ozone can occur in areas immediately adjacent to facilities which reduce their NOx

event, downwind areas receive ozone and NOx from many upwind states, and each upwind area contributes to downwind pollution events in many different states. 63 Fed. Reg. 57,356, 57,394-396.

The NOx SIP Call Rule was a partial response – five years overdue – to the mandate contained in the 1990 Clean Air Act that all states with ozone serious nonattainment areas must adopt plans no later than November 1994 to correct the nonattainment problem. 42 U.S.C § 7511a(c)(2). As part of a negotiated stay of litigation over EPA's extensions to states of the statutory attainment demonstration deadlines, the Ozone Transport Assessment Group ("OTAG") was created. 62 Fed. Reg. 60,318, 60,323 (Nov. 7, 1997). In OTAG, 37 states came together to complete regional modeling and reach regional solutions to the interstate ozone transport problem. The technical work done by OTAG utilized "the most complete, scientifically-credible tools and data available" (*id.* at 60,331), and included state-of-the-art air quality modeling, at the regional and subregional levels, to which EPA added state-specific refinements. 63 Fed. Reg. 57,356, 57,387, 57,390-391.

The combination of the cumulative, nonlinear nature of ozone production and the Agency's statutorily-defined duty under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) of the Act meant that EPA, faced with OTAG's indisputable

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emissions, it is not correct to say that NOx "destroys" ozone in any sense. Indeed, *transported* ozone – the subject of the EPA Rule and this case, does not decrease when NOx emissions are increased; rather transported ozone decreases when NOx emissions are *decreased*. *See* 63 Fed. Reg. 57,356, 57,424-425, 57,439-441.

evidence of pollutant transport across state lines, was required to distribute responsibility among all the upwind states to adopt controls on sources contributing to ozone nonattainment and maintenance problems in all downwind states.

EPA implemented the OTAG findings, making a state-by-state assessment of emissions contributions to downwind nonattainment and maintenance problems, and apportioning responsibility for the needed NOx reductions based on the emissions modeling and the availability of additional highly cost-effective controls in each of the states. *Id.* at 57,376-378, 57,389-391. From this multi-faceted analysis, EPA developed state-by-state NOx emissions "budgets," which each state may meet by any means available to it. *Id.* at 57,426.

State and Industry Petitioners challenged EPA's resulting NOx SIP Call Rule in the D.C. Circuit, alleging that the Agency's consideration of the availability of cost-effective control measures in defining significant contributions from upwind to downwind states violated the Clean Air Act. State Petitioners also argued that EPA's actions violated the Constitutional non-delegation doctrine.

The D.C. Circuit upheld the EPA Rule on both counts, noting that the term "significant" does not require an unidimensional (health only) analysis, and that the various petitioners were not only in conflict over this point, but had "conspicuously fail[ed] to describe the intellectual process by which EPA would determine 'significance' if it may consider only health." Ind. Pet., App. at 21a, 22a. The court went on to hold that there is nothing in the D.C. Circuit's case law, or in "the text, structure, or

history of the Clean Air Act that bars EPA from considering cost" in this analysis. Ind. Pet., App. at 25a.

On the non-delegation question, the State Petitioners did not allege that the Clean Air Act itself violated the non-delegation doctrine, but rather challenged as an unbounded exercise of Agency discretion the EPA's action in selecting the $2000/ton cost-effectiveness point as an element of the significance determination. The D.C. Circuit upheld the Agency's action against this charge, noting that the non-delegation doctrine is itself limited in its application. It was significant to the court that the Agency's action was both constrained by the statutory factors of the significance analysis, and limited geographically, so that the scope of the Rule did not " 'encompass all American enterprise'." Ind. Pet., App. at 27a-28a (quoting *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310, 1317 (D.C. Cir. 1991)). The D.C. Circuit refused requests for rehearing *en banc*, over a single dissent.[5]

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[5] Judge Sentelle dissented, as he had on the merits. Judges Tatel and Garland did not participate in considering whether to grant rehearing *en banc*. Order Denying Reh'g *En Banc* in No. 98-1497 and consolidated cases, June 22, 2000, *reprinted at* Ind. Pet., App. at 64a.

REASONS FOR REJECTING THE PETITIONS FOR REVIEW

I. THIS COURT SHOULD DENY CERTIORARI ON THE "SIGNIFICANT CONTRIBUTION" QUESTIONS.

The only question raised by the Petitions of Ohio and Michigan, and the primary one raised by that of Industry, is whether – or how much – EPA may consider cost as a factor in finding that certain sources are producing NOx emissions that "contribute significantly" to nonattainment in another state within the meaning of Section 110(a)(2)(D)(i)(I) of the Act. As discussed *infra* at Section I.B., Congress did not define the term "contribute significantly." Therefore, EPA's interpretation of the term is entitled to considerable weight under the settled law of this Court, and should be upheld unless it is impermissible. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"). In other words, this is a case that is properly decided under "step two" of the *Chevron* analysis, not "step one." The D.C. Circuit's decision finding permissible EPA's inclusion of cost in the factors considered in determining the significance level of upwind state contributions to downwind nonattainment is completely consistent with the established case law of this Court and the Courts of Appeals.

As the D.C. Circuit noted, in the proceeding below neither the State nor Industry Petitioners could make up their minds as to whether or how Congress intended EPA to consider cost in determining what contributions to nonattainment are "significant." *See* Ind. Pet., App. at

17a-20a. Initially, the States argued that EPA could consider cost, but could not make it the controlling factor in determining significance. *Id.* However, "[a]t oral argument, counsel for the States abandoned this position and decided that the statute flatly prohibits EPA from considering costs at all." Ind. Pet., App. at 18a-19a. On the other hand, Industry initially argued below that EPA could consider only "air quality impacts," not costs. Industry presented a different position at oral argument, however, claiming that while EPA could not consider costs under Section 110(a)(2)(D) of the Act (in determining whether a SIP prohibits emissions from sources that "significantly contribute" to nonattainment), it nevertheless could consider costs under Section 110(k)(5) (in determining whether a SIP is "adequate"). Ind. Pet., App. at 20a.

Petitioners still do not agree on how Congress intended EPA to treat costs in issuing a "SIP call" under Sections 110(a)(2)(D) and 110(k)(5) of the Act, presenting three inconsistent positions to this Court. Industry's Petition argues that EPA may consider cost in determining the proper level of emission reductions required to correct an interstate pollution transport problem, but only under Section 110(k)(5)'s adequate mitigation language and not under Section 110(a)(2)(D)'s significant contribution language. Ind. Pet. at 13, 18. The State Petitions now contain two distinct variations of the cost argument. The Michigan Petition argues that EPA cannot consider cost at all. Michigan Pet. at 12-13, 19. On the other hand, the Ohio Petition appears to argue that cost may be a factor in EPA's determination of what contributions are significant, but only a subordinate factor. Ohio Pet. at 11, 15. Different petitioners have the right, of course, to raise

different theories of their case. But in this case these disparate interpretations raise the obvious question – if Congressional intent here is so clear, then why can't Petitioners agree on what that intent was?

A. The D.C. Circuit's Holding that EPA's Interpretation of "Significant Contribution" is Permissible Does Not Conflict with the Decisions of this Court or with Other Decisions of the D.C. Circuit.

Petitioners claim that the D.C. Circuit's decision upholding EPA's consideration of cost as a factor in determining when a contribution to downwind nonattainment is "significant" conflicts with various decisions of this Court and other decisions of the D.C. Circuit. Petitioners are wrong.

First, Petitioners claim that the lower court's decision conflicts with the decision of this Court in *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) ("*Union Electric*"). *See* Michigan Pet. at 14-19. However, *Union Electric* is not on point here. In that case, this Court was faced with a polluter's challenge to EPA's approval of a SIP on the grounds that EPA was required to consider whether the state's choice of controls in the SIP were economically or technologically infeasible. This Court upheld EPA's position[6] that it was not authorized to reject a SIP on such grounds, finding that Congress had set out minimum requirements that a SIP must meet in order to obtain EPA approval, and

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[6] The Court noted that "we have previously accorded great deference to the Administrator's construction of the Clean Air Act [citations omitted]." *Union Elec.*, 427 U.S. at 256.

that the three-year deadline for achieving the NAAQS set by Congress "leaves no room for claims of technological or economic infeasibility." *Union Elec.*, 427 U.S. at 256-260. The Court stated that the Act's minimum compliance requirements are of a "technology-forcing" nature, and "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Id.* at 257. The Court also made clear, however, that as long as a state plan would achieve attainment and meet the minimum requirements of the Act, the states were free to choose particular measures needed to accomplish that task, and were free to consider infeasibility claims in so doing. *Id.* at 260-265. Indeed, the Court stated explicitly that "we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan. . . . " *Id.* at 266.

The instant case is entirely different from *Union Electric*. Neither the EPA nor the Court is faced here, as the Court was in *Union Electric*, with the implications of the "technology-forcing" character of the Act's attainment requirements. We are not concerned here with the question of whether all measures that are or could be contained in an implementation plan will in the aggregate be adequate to achieve timely attainment of the ozone NAAQS,[7] or whether additional measures that may not

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[7] As the Court recognized in *Union Electric*, "the [Act does] allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national standards." *Union Elec.*, 427 U.S. at 266.

be technologically or economically feasible must be included in such a plan.

Attainment of the NAAQS in a state impacted by emissions transported across its borders requires a combination of in-state and upwind state emission control measures. Section 110(a)(2)(D) does not place the entire burden of downwind attainment on upwind states, because it does not require the elimination of all upwind emissions necessary for a downwind state to achieve attainment.[8] If it did, *Union Electric* might well prohibit EPA from considering cost in determining the level of required upwind emission reductions, at least if the effect of such consideration would be the failure to achieve downwind attainment. Here, however, Congress has authorized EPA to require the elimination of some – but not all – upwind emissions, specifically those that "contribute significantly" to downwind attainment problems. In this sense, Section 110(a)(2)(D)(i)(I) is similar to other provisions in the Act that specifically target certain emissions or emission sources that represent but a portion of the overall reductions necessary to achieve attainment. In the context of such specific implementation measures, EPA has often been permitted, and in some cases,

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[8] EPA so stated in the NOx SIP Call Rule, noting that even after implementation of its rulemaking reducing upwind emissions, some downwind areas will require additional local reductions. *See*, 63 Fed. Reg. 57,356, 57,374, 57,377, 57,403.

required, to consider issues of technological and economic feasibility, or of cost or cost-effectiveness.[9]

Furthermore, unlike *Union Electric*, this case does not involve a claim that a state's choice of emission controls in its implementation plan is technologically or economically infeasible. Indeed, this case does not deal with a state's choice of emission controls at all. Rather, this case involves EPA's interpretation of its own authority to find that a state has failed to control interstate emissions as mandated by Congress and to impose a remedy for that failure.[10] Finally, the present case does not deal with claims of technical or economic infeasibility, but rather

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[9] For cases in which the D.C. Circuit has found that EPA can lawfully consider costs in Clean Air Act rulemaking, *see, e.g., George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999) (examining Clean Air Act Section 211, 42 U.S.C. § 7545, providing for the regulation of reformulated gasoline); *NRDC v. EPA*, 937 F.2d 641 (D.C. Cir. 1991) (upholding EPA's use of cost-benefit analysis to determine that a particular polluting source should not be classified as "major" under Section 165 of the Act, 42 U.S.C. § 7475).

Congress also has specifically allowed or required EPA to consider costs in connection with a variety of specific emission reduction measures; *see, e.g.*, 42 U.S.C. § 7521(a)(3)(A)(i) (mobile source standards); 42 U.S.C. § 7545(c)(2)(B) (fuel additive regulation); 42 U.S.C. § 7411(a)(1), (b)(1) (certain new stationary source standards); 42 U.S.C. § 7547(a)(3) (nonroad vehicle compliance deadlines); 42 U.S.C. § 7571(b) (aircraft compliance deadlines); and 42 U.S.C. § 7511b(b)(3) and (4), (e)(1) (certain control techniques guidelines for VOCs).

[10] This Court in *Union Electric* explicitly did not reach the question of whether EPA could consider factors of economic or technical infeasibility in drafting its own implementation plan where a state fails to do so. *Union Elec.*, 427 U.S. at 261, n.7.

with issues of cost and cost-effectiveness.[11] For all of the above reasons, *Union Electric* does not conflict with the lower court's holding here.[12]

The decision of the D.C. Circuit in this case furthermore does not conflict with other decisions of that court.[13] First of all, contrary to the claims of Michigan Petitioners, there is no conflict with *American Trucking Ass'ns v. Browner*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d

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[11] In another Clean Air Act case presently before this Court, *American Trucking Ass'ns v. Browner*, No. 99-1426, several industry petitioners recently argued that *Union Electric* "never mentions cost-benefit analysis," and "could not be clearer that it dealt only with 'technological and economic infeasibility.' " Reply Brief for Cross-Petitioners (ATA, et al.) in No. 99-1426, at 16-17 (Oct. 6, 2000) (citation omitted).

[12] Several other opinions of this Court mentioned in passing by Industry do not support its arguments here. *See* Ind. Pet. at 16-17. First, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) was concerned with retroactive agency rulemaking under the Medicare program, and is not relevant here because EPA's NOx SIP Call Rule is not retroactive rulemaking. Nor is *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) of any assistance to Petitioners. In that case, a divided Court struck down the Secretary of Labor's proposed benzene regulations, finding that "Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Id.* at 646. Indeed, the Court found that the statutory requirement that the Secretary conduct "some cost-benefit analysis" prior to setting a standard manifested the intention of Congress that the Secretary must find a "significant risk of harm." *Id.* at 644. The Court clearly did not find that the Secretary could not consider costs in setting a standard.

[13] We note that there was not a close split of D.C. Circuit judges in this case. Indeed, only a single judge would have granted the petitions for *en banc* rehearing. Ind. Pet., App. at 64a-65a.

4 (D.C. Cir. 1999), *cert. granted*, 120 S.Ct. 2003, 2193 (2000) (Nos. 99-1426, 99-1257) *("ATA")*, or *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) *("Lead Industries")*. Neither *ATA* nor *Lead Industries* is relevant to the present case, as both were concerned with the promulgation of NAAQS under Section 109 of the Act, 42 U.S.C. § 7409, not the implementation of the resulting standards.[14] These two cases are part of a long line of D.C. Circuit cases that have consistently found that "[t]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead*

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[14] The plain language of Section 109(b)(1) makes clear that the NAAQS must be set "based on" "air quality criteria" established under Section 108, 42 U.S.C. § 7408, and must be "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The air quality criteria, in turn, "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2). The Act's legislative history provides clear evidence that Congress intended EPA to be limited to public health considerations when setting NAAQS. Thus, both the statute and legislative history provide that the establishment of the primary, health-based, NAAQS are confined to public health considerations. *See* Brief of Cross-Respondent American Lung Ass'n in *ATA*, No. 99-1426 (September 8, 2000). Further, Congress has ratified this long-standing interpretation of EPA's authority to establish NAAQS through repeated legislative proceedings over the past three decades in which it has considered and rejected initiatives to provide for the consideration of costs in establishing the NAAQS. *See* Brief of *Amici Curiae* Environmental Defense, American Public Health Association, *et al.* on Behalf of Cross-Respondents, in *ATA* No. 99-1426, at 5-15 (September 11, 2000).

Indus., 647 F.2d at 1148. *See also, e.g., American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991); and *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Because Congress has often – both explicitly and implicitly – authorized EPA to consider cost-related factors in *implementing* the NAAQS, cases such as *ATA* and *Lead Industries* dealing with the use of such factors in *promulgating* the NAAQS are simply not relevant to the issues raised by Petitioners here.[15] The various D.C. Circuit opinions addressing when EPA may take cost into consideration under different Clean Air Act provisions hardly constitute the "hodge-podge" alleged by Industry. *See* Ind. Pet. at 6. Rather, these cases divide along clear lines – EPA cannot consider costs when promulgating an air quality standard, but may, and in some cases, must, do so in implementing such a standard.[16]

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[15] *See* examples cited at footnote 9, *supra*. We also note that Michigan, *et al.*, argue that "EPA's consideration of costs under § 110(a)(2)(D) is wholly inconsistent with the position the EPA adopted before this Court in the EPA's petition for a writ of certiorari in *ATA*." Michigan Pet. at 8. But, in fact, EPA's positions in *ATA* and in this case are perfectly compatible: ATA deals with the promulgation of the NAAQS under Section 109, where consideration of costs has long and properly been excluded, while the instant case deals with the implementation of the NAAQS, where EPA's consideration of costs have often been upheld.

[16] The D.C. Circuit's opinion in *NRDC v. EPA*, 824 F.2d 1146, 1157 (D.C. Cir. 1987) (*en banc*), referenced in the Industry Petition at 7, was concerned with EPA's establishment of limits on source emissions of hazardous air pollutants under an earlier version of Section 112 of the Act, not with the promulgation of ambient air quality standards under Section 109.

The D.C. Circuit's ruling here also does not conflict with its decision in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) (*"Ethyl"*), as argued by Industry. Ind. Pet. at 17-18. *Ethyl* dealt with Section 211(f)(4) of the Act, 42 U.S.C. § 7545(f)(4), authorizing EPA to grant a waiver from the prohibition on the use of certain fuel additives if the manufacturer could show that the additive "will not cause or contribute to a failure of any emission device or control system . . . to achieve compliance by the vehicle with the emission standards." EPA decided that Ethyl Corporation had made the above showings, but nevertheless denied the waiver on the grounds that EPA could consider other factors such as whether the waiver was consistent with the public interest and the effects of the additive on public health. *Ethyl*, 51 F.3d at 1054-55. Noting that EPA had specifically determined that Ethyl Corporation met the explicit statutory criteria, that EPA's waiver denial was inconsistent with its published guidance and indeed that this was the first waiver case where EPA had considered factors other than those set forth in Section 211(f)(4), the D.C. Circuit held that given the plain meaning of the statute, EPA erred in considering those other factors. *Ethyl*, 51 F.3d at 1056, 1058. In this case, Section 110(a)(2)(D) does not provide a set of exclusive criteria that controls EPA's determination of the level of emissions that "significantly contribute" to downwind nonattainment and must be "adequately mitigated" under Section 110(k)(5). The use by Congress of these undefined terms permits EPA discretion in interpreting them, unlike the very explicit language in Section 211(f)(4) that the court in *Ethyl* determined provided EPA with very little discretion.

B. EPA's Consideration of Costs Under Sections 110(a)(2)(D) and 110(k)(5) Is Permissible Under Established Case Law.

This is not a case where the lower court has committed a clear error of law on an important or novel legal question. Rather, the "significant contribution" issue is easily resolved under the well-established rules of statutory construction set out in *Chevron* and its progeny. Since *Chevron*, federal courts have used a two-part test to review an agency's construction of a statute that it administers. This test is described in *Chevron* as follows:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [footnotes omitted].

Chevron, 467 U.S. at 842-43. Furthermore, in examining this second question, *Chevron* provides that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . *Id.* at 844.

The issue raised by Petitioners in this case is whether EPA may consider costs in carrying out its obligations to ensure that SIPs adequately address interstate emissions

under Sections 110(a)(2)(D) and 110(k)(5) of the Act. Congress has not defined the phrase "contribute significantly" in Section 110(a)(2)(D). It has not defined when a SIP is "substantially inadequate" or when a plan will "mitigate adequately" interstate pollution transport within the meaning of Section 110(k)(5). Nor has Congress enumerated the factors that EPA must consider when determining whether a state's emissions contribute significantly to downwind nonattainment or how much emissions reduction is needed to mitigate adequately such contributions. Congress clearly has not prohibited EPA from considering cost factors in making either of these determinations. As mentioned earlier, Petitioners' inability to agree on whether and to what extent Congress did intend EPA to consider costs in requiring interstate emissions reductions pursuant to Sections 110(a)(2)(D) and 110(k)(5) of the Act speaks volumes to the lack of any clear Congressional direction on this issue. As the D.C. Circuit observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say that there is 'clear congressional intent to preclude consideration of cost' under § 110(a)(2)(D)" Ind. Pet., App. at 20a (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (*en banc*)). Because Congress has not directly addressed the precise question of whether costs may be considered under Sections 110(a)(2)(D) and 110(k)(5), EPA's resolution of that question is properly reviewed under step two of *Chevron*.

While EPA's interpretation of Sections 110(a)(2)(D) and 110(k)(5) may not be the only possible one, it is a reasonable one and therefore is permissible under *Chevron's* second step. 467 U.S. at 837. EPA considered a

variety of air-quality related factors,[17] based on the most sophisticated modeling available, in addition to the availability of cost-effective controls, in its multi-factor approach to "significant contribution." *See* 63 Fed. Reg. 57,356, 57,376-379. Cost was *not* the sole factor considered.

Furthermore, no one disputes that the failure of many areas in the Eastern United States to attain the ozone standard almost 30 years after it was first promulgated is due to contributions from both local (in-state) and upwind (out-of-state) emissions sources.[18] The basic structure of Section 110(a)(2)(D) requires EPA to include an assessment of the relative level of control efforts in the upwind and downwind states as part of its determination of whether a state's contribution is significant. Unless EPA were to interpret Section 110(a)(2)(D)(i)(I) as prohibiting *all* upwind emissions that impacted downwind nonattainment in any way (an interpretation that no party thus far has advocated in this case), EPA had to interpret the Congressional prohibition of significantly contributing emissions in such a way that, among other things, reasonably allocated responsibility between upwind and

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[17] EPA considered the following air quality factors:

"[t]he overall nature of the ozone problem . . . ;"

"the extent of the downwind nonattainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in downwind areas;" and

"the ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems." 63 Fed. Reg. 57,356, 57,376. *See also* 62 Fed. Reg. 60,318, 60,325.

[18] *See* Ind. Pet. at 8-9; Ohio Pet. at 8.

downwind states, and among different upwind states themselves. EPA's consideration of cost in this context was a perfectly reasonable means to equitably allocate the burden of emissions reductions among the numerous states contributing to the problem.

If EPA did not consider costs and instead adopted a "bright-line" emissions contribution test as urged by some Petitioners,[19] the economic burden of compliance throughout the eastern United States could be quite disparate. Such a test could mean that a downwind state that had already adopted stringent controls would be forced to adopt even more stringent controls while upwind states could escape even basic – and much more cost-effective – controls.[20] On the other hand, if the "bright line" emissions contribution level were set low enough, the reverse could occur – that is, upwind states would bear a disproportionate share of the emissions reductions burden while downwind states would incur no responsibility. Of course, the same disparities could occur between different upwind states as well. In addressing the implications of Petitioners' arguments below, the D.C. Circuit noted that "counsel eventually went so far as to claim that if faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a

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[19] *See* Ohio Pet. at 9.

[20] Indeed, EPA found that additional downwind controls would cost about $4300 per ton of NOx removed, while the regional reductions required by EPA's rule would cost only approximately $1500 per ton removed. 63 Fed. Reg. 57,356, 57,379.

ton, EPA must mandate the same cutback for each." Ind. Pet., App. at 19a.

Petitioners provide absolutely no evidence that Congress intended that EPA adopt such an approach to addressing the problem of interstate transport under Sections 110(a)(2)(D) and 110(k)(5). Rather, Congress intended quite the opposite. For example, when Congress added one predecessor to Section 110(a)(2)(D), Senate commenters noted that the new provisions were "intended to equalize the positions of the States with respect to interstate pollution," and to ameliorate previously existing "distinct economic and competitive disadvantage[s]." S. Rep. No. 95-127 at 41-42, *reprinted* in 3 1977 Leg. Hist. 1415-16. Thus, factoring cost-effectiveness into the assessment of significance allowed EPA to respond to dual directives presented it by Congress: prohibit all significant contribution, and take the equities of the situation into account in allocating responsibility for the ozone problem among different states in a region.

II. THERE ARE NO GROUNDS FOR A GRANT OF CERTIORARI ON THE NON-DELEGATION DOCTRINE QUESTION

Industry Petitioners' argument that this Court should grant certiorari to review the D.C. Circuit's decision on the State Petitioners' non-delegation doctrine challenge is meritless. Industry Petitioners fail to identify any conflict between the D.C. Circuit's ultimate decision in *Michigan* and the non-delegation jurisprudence of this Court, nor

do they identify any conflict within the D.C. Circuit's jurisprudence.[21]

A. There is No Conflict Between the D.C. Circuit's Holding and This Court's Non-Delegation Doctrine Jurisprudence.

Industry Petitioners, for the first time in this case,[22] raise their claim that EPA's analysis of significant contribution is a constitutionally-impermissible exercise by the Agency of the authority delegated to it by Congress. The D.C. Circuit determined that EPA's significant contribution analysis did not represent a constitutionally impermissible exercise of Agency discretion, and therefore did not run afoul of the nondelegation doctrine, because the Agency's assessment of significance was confined by several technical threshold determinations, and because the resulting rule was limited in its scope. Ind. Pet., App. at 27a-28a.

While Industry baldly claims that the D.C. Circuit has "turned upside-down the principle of unconstitutional delegation," they completely fail to describe any conflict between the D.C. Circuit's ultimate decision on this point and this Court's nondelegation jurisprudence. Indeed, it is Industry Petitioners (and the State Petitioners in the case below) who attempt to "turn the

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[21] Petitioners do not assert that any conflict exists between the D.C. Circuit's *Michigan* holding and decisions of any other Circuit Courts of Appeals.

[22] Industry Petitioners did not raise their nondelegation argument before the D.C. Circuit; State Petitioners did raise the issue below, but do not seek certiorari on that point.

nondelegation doctrine on its head" by using it to analyze Agency actions under delegated authority, rather than to examine the Congressional delegation of authority itself. The nondelegation doctrine consistently has been used by this Court as a constraint on Congressional, not administrative action.[23] Moreover, the Court is currently reviewing the D.C. Circuit's application of the non-delegation doctrine in the context of the Clean Air Act. *ATA*, No. 99-1257.

Assuming, *arguendo*, that it was appropriate for the D.C. Circuit to apply the nondelegation doctrine to analyze the Agency's action in issuing the NOx SIP Call, it is clear that the D.C. Circuit's *Michigan* holding is consistent with this Court's jurisprudence. This Court's nondelegation cases recognize that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The interstate transport of ozone pollution and its NOx precursor absolutely is the kind of complex technical problem for which the delegation to an agency with substantial technical and scientific expertise is appropriate.

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[23] *See e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (the purpose of the nondelegation doctrine is to ensure that important policy choices are made by *Congress*, and that *Congress* has provided "intelligible principles" to guide agency action).

Furthermore, this Court's analysis has never ended at the question whether the delegation of authority to an agency is broad or limited – the Court looks to the overall scope of the delegated authority and the statutory context in which the rules under it are developed. Indeed, agency actions under statutes including broad delegations of authority have consistently been upheld. *Loving v. United States*, 517 U.S. 748, 771 (1996) (*citing National Broad. Co. v. United States*, 319 U.S. 190, 216-217, 225-26 (1943)). There have been only two instances in the history of the non-delegation doctrine in which this Court has struck down a Congressional delegation of authority, and in each of those cases the concern was with completely standardless or limitless delegation, not simply the grant of broad authority.[24] But EPA's decisionmaking in the NOx SIP Call was neither standardless nor limitless – the D.C. Circuit found the Agency had constrained its discretion both by the factors it used to bound its significance analysis, and by the limited geographic scope of the Rule.

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[24] *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 418, 420, 431-32 (1935); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537-542 & 553 (1935) (Cardozo, J. concurring and noting particular concern where the delegated authority extends "as wide as the field of industrial regulation."). And even in *Panama* and *Schecter*, the Court recognized that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly." *Panama*, 293 U.S. at 248; *Schecter*, 295 U.S. 495, 529-530. That is precisely the situation presented here – EPA has been delegated a complex problem to solve – a problem involving a host of technical details that Congress could not have efficiently or expertly addressed itself.

Moreover, the delegation of authority to EPA under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) was specifically limited by Congress. Clear boundaries confine EPA's exercise of its discretion in the NOx SIP Call Rule, including the following recognized by the D.C. Circuit: "EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." Ind. Pet., App. at 28a.

The court also found that because the resulting NOx SIP Call Rule did not "affect the whole economy," a more precise set of standards confining the Agency's action was unnecessary. *Id.* Whatever else one may think of this analysis, it is completely consistent with this Court's nondelegation jurisprudence, which examines not only the standards governing agency action, but the scope of the delegated power. *See, e.g., Synar v. United States,* 626 F. Supp. 1374, 1386 (D.D.C.), *aff'd sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986) (constitutionality of a delegation must be assessed both on the basis of the specificity of the standards governing its exercise and the overall scope of the power granted).

B. The D.C. Circuit's Holding Does Not Represent an Intra-Circuit Conflict.

Industry Petitioners paint a picture of the D.C. Circuit in conflict with itself that is simply incorrect. They allege that the *Michigan* decision is somehow at odds with the D.C. Circuit's previous decisions, particularly *ATA.*

While we disagree strongly with the D. C. Circuit's decision in *ATA*, it certainly is not in conflict with the decision in *Michigan* on the grounds asserted by Industry Petitioners.[25]

The *Michigan* court upheld the Agency's exercise of its authority under a broad delegation not only because the Agency's action was confined by articulated standards,[26] Ind. Pet., App. at 28a, but also because the

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[25] In earlier D.C. Circuit decisions upholding previous EPA significant contribution determinations under the Act, the nondelegation doctrine was not even at issue. *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976).

[26] This point is ignored by Industry Petitioners, who simply seize the court's *dicta* (namely the statement that the selection by EPA of the $2000/ton cost-effectiveness cutoff as one element of the significance analysis "is a radically incomplete line-drawing device") to allege an exercise of standardless discretion. Ind. Pet. at 20. But Industry Petitioners significantly fail to note that the court went on to find that EPA had properly limited its action under the statute through three threshold determinations. Ind. Pet., App. at 28a.

Furthermore, while we agree with the D.C. Circuit that EPA's NOx SIP Call Rule was a valid exercise of delegated Agency authority, we do not agree with the court's *dictum* that EPA "understood that its selection of the [cost] cut-off point was essentially unbounded." Ind. Pet., App. at 27a. EPA did not simply pick the $2000/ton figure out of thin air. Rather, it evaluated the cost of NOx emission control options, and found that most "emissions controls that are available and of comparable cost to other recently undertaken or planned NOx [controls] . . . fall below $2000/ton." 63 Fed. Reg. 57,356, 57,400. EPA further explained that "the cost-effectiveness of measures that EPA or States have adopted, or proposed to adopt, forms a good reference point for determining which of the available additional NOx control measures can most easily be

resulting Rule is limited in scope both geographically and because it does not affect all American enterprise. *Id.* at 27a-28a. Industry Petitioners erroneously suggest that this represents a new or different approach taken by the D.C. Circuit to its analysis of agency action under the nondelegation doctrine. Ind. Pet. at 20. It is notable that they provide no citations illustrating the conflict they suggest.

In fact, the court's *Michigan* analysis is completely consistent with previous cases in which the D.C. Circuit (wrongly, we believe) has used the nondelegation doctrine to analyze agency actions under Congressionally-delegated authority. In *ATA*, the court noted its view that where the Agency "standards in question affect the whole economy," a more precise delegation (or more accurately to the situation, a decisional principle more clearly articulated by the Agency) is required. *ATA*, 175 F.3d at 1037 (citing *Schecter*, 295 U.S. 495, 553 (1935)). Similarly, in *Lockout/Tagout I*, 938 F.2d at 1317 (D.C. Cir. 1991), the court remanded a rule precisely because the scope of the agency's claimed power to roam was "immense, encompassing all American enterprise," and, the D.C. Circuit believed, this ran afoul of the nondelegation doctrine. The *Michigan* court, distinguishing those earlier holdings,

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implemented by upwind states whose emissions impact downwind nonattainment problems." *Id.* This approach is analogous to various provisions in the Act requiring sources to install emission control technology that is "reasonably available." *See, e.g.*, 42 U.S.C. § 7502(c)(1) (requiring major sources in ozone nonattainment areas to install "reasonably available control technology").

held not only that the Agency had constrained its decisionmaking,[27] but that the resulting rule does not affect the whole economy. Ind. Pet., App. 28a. *Michigan* therefore does not represent a new approach by the D.C. Circuit, nor is it in conflict with its earlier decisions, and therefore is not worthy of a grant of certiorari by this Court.

More importantly, as noted *supra*, this Court currently is reviewing an important Clean Air Act case in which both the ultimate results of the D.C. Circuit's non-delegation doctrine analysis and its reasoning were inconsistent with this Court's non-delegation jurisprudence. *ATA*, No. 99-1257. That case provides this Court ample opportunity to evaluate how the D.C. Circuit is applying the non-delegation doctrine, making review of the instant case unnecessary.

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[27] In fact, the court's concern in *Lockout/Tagout I*, that the agency's asserted power to make a rule so stringent as to risk taking industry to the verge of economic ruin, *see Lockout/Tagout I*, 938 F.2d at 1317, is clearly not at issue here, where EPA has included the availability of cost-effective NOx controls as one limiting element in its significance determination.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari on the questions presented in the State and Industry Petitions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (PROVINCE OF ONTARIO, CANADA) IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Environmental Protection Agency ("EPA") acted reasonably and in accordance with Section 110(a)(2)(D)(i)(I) of the Clean Air Act when it relied on its general rulemaking authority to consider cost-effectiveness in ascertaining the amount of emissions from upwind states which "contribute significantly" to non-attainment of ozone pollution standards in downwind states.

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STATEMENT OF THE CASE

The Province of Ontario will adopt the Statement of the Case in the Brief in Opposition filed by Respondent EPA. In addition, Ontario presents the following supplementary facts.

1. NOx EMISSIONS FROM THE UNITED STATES CAUSE INCREASED GROUND-LEVEL OZONE IN ONTARIO

The NOx SIP Call Rule upheld by the Court of Appeals for the District of Columbia Circuit in this case (63 Fed. Reg. 57,356 (Oct. 27, 1998)) will have the effect of reducing nitrogen oxide ("NOx") emissions and ground-level ozone transported within the United States and, because of prevailing winds, also transported to the United States' neighbor, the Province of Ontario, Canada.

Ontario has the largest population of any of the Canadian provinces, and the majority of the Ontario population is concentrated in the southern part of the Province, in the Great Lakes region. This region receives the most transported NOx and ozone from the United States.

Ontario and the states subject to the NOx SIP Call share a common airshed. The airshed observes no state or international boundaries. The United States contributes 91 percent of the NOx emissions to our common airshed, while Canadian sources contribute only 9 percent. J.A. 2615.

A significant portion of ground-level ozone in Ontario originates from emissions from the United States. The Ozone Transport Assessment Group ("OTAG"), which was composed of the 37 easternmost states, and industry and environmental stakeholders, modeled the transport of air pollution in North

America. OTAG's modeling shows that weather and wind patterns in the ozone season result in NOx emissions and ozone formed in the United States being transported to Ontario. J.A. 2620. In fact, 50 percent or more of Ontario's ozone problem originates in the United States. J.A. 3563.

The only locations in Ontario at which ground-level ozone consistently exceeds the 120 parts per billion level (ppb) (which is the United States one-hour ozone national ambient air quality standard ("NAAQS")), are sites in the southern part of the Province along the Great Lakes.[1/] J.A. 2621. These high ozone levels are caused by transport of ozone and its precursors from the United States across Lake Erie and Lake Huron. *Ibid.* Morever, modeling conducted by the State of Michigan shows that the Toronto/London corridor in Ontario receives significant contributions of ozone and ozone precursors from southeastern Michigan. J.A. 2672.

Ozone problems in Ontario cannot be solved without major reductions in NOx emissions from the United States. Studies by Ontario scientists have shown that NOx and volatile organic compound emissions originating in the United States can, by themselves, cause Ontario's ambient air quality criterion for ozone to be exceeded. Brief of Intervenor Respondent Her Majesty the Queen in Right of Ontario (Province of Ontario, Canada), August 27, 1999, D.C. Cir., Nos. 98-1497, *et al.*, Attachment 1, p. 5. Thus, even if all of Ontario's industries and utilities were not operating and no automobiles were being driven in Ontario, ground level ozone problems in Ontario would still exist because of transboundary pollution from the United States.

[1/] We note that Ontario's own ground-level ozone standard is more stringent at 80 ppb. J.A. 2672.

2. GROUND-LEVEL OZONE HARMS HUMAN HEALTH AND THE ENVIRONMENT IN ONTARIO

NOx emissions harm human health and cause environmental damage. NOx emissions and volatile organic compounds react in the presence of sunlight to form ground-level ozone. 63 Fed. Reg. at 57,359. There does not appear to be a "threshold level" for ground-level ozone below which no health effects are observed. J.A. 3566.

The Ontario Medical Association summarized recent research findings concerning the health effects of ground-level ozone as follows (J.A. 3565):

> In a review of available evidence for the Canadian Smog Advisory Program, two expert panels concluded that health and health-care system effects of ground-level ozone at levels that occur in Canada include lung inflammation, decreased lung function, airway hyper-reactivity, respiratory symptoms, possible increased medication use and physician/emergency room visits among individuals with heart or lung disease, reduced exercise capacity, increased hospital admissions and possible increased mortality. [footnote omitted]

Elevated levels of ground-level ozone, which occur on hot, humid days, are a major ingredient of smog. Ozone in smog has been shown to cause airway inflammation in both healthy individuals, and those who suffer from respiratory ailments such as asthma. J.A. 3553, 3568. Studies have shown that even healthy outdoor workers have a measurable decrease

in lung function when exposed to low levels of ozone. J.A. 3566. In those who suffer from asthma, elevated ozone levels cause increased frequency of asthma attacks, emergency room visits, and hospital admissions. J.A. 3568. A study in Toronto, Ontario, showed that increased ozone levels were associated with increased mortality due to respiratory disease in those who suffer from cardio-respiratory illness. J.A. 3569.

Two independent studies in Ontario show that there is a correlation between elevated ozone levels and hospital admissions for acute respiratory disease. J.A. 3574. Asthma hospital admissions for children on the day after Ontario's ozone levels had exceeded the 80 ppb standard were consistently higher than such admissions on other summer days. *Ibid.*

Children are particularly at risk from ground-level ozone and are, in fact, the largest group sensitive to ozone air pollution. Children tend to be active outdoors in the summer when ground-level ozone levels are highest. J.A. 3570. The breathing pattern of children is different from that of adults, causing them to inhale and retain greater quantities per unit body weight than adults. *Ibid.* Studies, including those conducted in Ontario, show a measurable decrease in lung function of healthy children exposed to ozone. J.A. 3570-3571. "Ozone makes asthmatics more responsive to an allergen." J.A. 3571. Further, a six-year study in Ontario found that 15 percent of summer respiratory hospital admissions for infants were pollutant-associated. J.A. 3574.

Ground-level ozone also damages the environment. EPA has found that ground-level ozone causes "significant agricultural crop yield losses" and visible damage to the foliage of many crops, trees, and ornamental plants. 63 Fed. Reg. at

57,359. Current ambient ground-level ozone levels are causing harm to forests and ecosystems. *Ibid.*

3. ONTARIO HAS MADE SUBSTANTIAL EFFORTS TO CONTROL ITS OWN NOx EMISSIONS

Ontario's air quality standard for ozone is 80 ppb (one-hour average) (J.A. 2672), which is more stringent than the United States' one-hour ozone standard of 120 ppb. In a June 2000 agreement among the federal, provincial, and territorial governments of Canada, Ontario agreed to a Canada-Wide Standard of 65 ppb (eight-hour average) air quality standard for ozone to be achieved by 2010.[2/]

Ontario's emissions of NOx for 1998, the most recent year for which data are available, were less than 1990 levels by 17.4 percent.[3/]

Ontario has also set a goal to reduce projected emissions of NOx by 25 percent from 1990 levels by 2005.[4/] As just stated, by 1998, Ontario had already achieved a 17.4 percent reduction in NOx emissions from 1990 levels. By comparison, Ontario scientists expect the NOx SIP Call Rule to reduce NOx emissions in the covered states by approximately 25 percent on average from 1990 levels by 2007. See 63 Fed. Reg. at 57,450.[5/] Ontario has further pledged to achieve a 45 percent reduction in NOx emissions from 1990 levels by 2015.

[2/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

[3/] See http://www.ene.gov.on.ca/envision/news/factnoxvoc.htm.

[4/] See http://www.ene.gov.on.ca/envision/news/00600MB.html.

[5/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

Under the NOx SIP Call Rule, the states are free to choose their own methods of meeting the requirements of the Rule. See 63 Fed. Reg. at 57,358-57,359. Ontario understands that most NOx emissions reductions in the midwestern states will come from the electrical generating sector.[6/] The average rate of NOx emissions per megawatt hour ("MWH") of electricity produced in 1996 was 2.6 pounds for the northeastern states and 6.6 pounds for the midwestern states. J.A. 2650. Since the record closed below, NOx emissions data for 1998 have become available. The 1998 data show that Ontario's electricity sector emits less than one (1) pound of NOx per megawatt hour of electricity produced.[7/] In 1998, Ontario emitted less NOx per megawatt hour of electricity produced than the States of Michigan (3.85 lbs./MWH), Ohio (4.71 lbs./MWH), Indiana (5.46 lbs./MWH), Illinois (3.43 lbs./MWH), and even New York (1.67 lbs./MWH). In 1998, Ontario emitted less than a pound (0.96 lbs.) of NOx per megawatt hour of electricity produced. *Ibid.*

Ontario's total NOx emissions from electrical generation in 1998 were also significantly less than emissions from the electricity sector in each of the five states just mentioned. In comparison to Ohio, Ontario's NOx emissions are less by a factor of 5.7; in comparison to Michigan, Ontario's emissions are less by a factor of 3.2; in comparison to Indiana, Ontario's emissions are less by a factor of 5.2; in comparison to Illinois, Ontario's emissions are less by a factor

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[6/]We note that petitioners Appalachian Power Company, *et al.*, are comprised almost exclusively of electrical power companies. See Petition for a Writ of Certiorari, October Term 2000, No. 00-445, "Disclosure Statement," pp. x-xiii.

[7/]See data summarized at http://www.ene.gov.on.ca.envision/news/3charts2.pdf. The website reports emissions in kilograms. One kilogram is approximately 2.2 pounds.

of 3.9; and in comparison to New York, Ontario's emissions are less by a factor of 1.4. *Ibid.*

Thus, the most recent data available show that Ontario's NOx emissions are less than emissions from each of the five states discussed above per megawatt hour of electricity produced and less than the identified states on an absolute basis. Nonetheless, Ontario has also committed to adopt the EPA standards for fossil-fueled electricity generating plants when they are implemented, if their adoption will result in lower emissions in Ontario.[8/]

Since 50 percent of Ontario's ozone originates in the United States, controls on NOx emissions from the midwestern states are critical in order for Ontario to improve its air quality with respect to smog. Thus, Ontario strongly supports EPA's NOx SIP Call Rule, which will result in reduced NOx emissions being transported as NOx and ozone to Ontario, as part of an overall program to reduce ground-level ozone and smog in Ontario.

The control of air pollution emissions in an airshed which extends beyond state and international boundaries poses extremely complex regulatory issues. Ontario had observer status with OTAG, and scientists with Ontario's Ministry of the Environment have analyzed the technical basis of EPA's NOx SIP Call Rule, which was based closely on the work of OTAG. Ontario's scientists have concluded that the Rule is the result of comprehensive scientific analysis of an extremely complex air pollution problem and that it reflects sound policy choices. Ontario submits that the NOx SIP Call Rule will lead to cleaner air in both the United States and Ontario, Canada, and should be allowed to take effect.

[8/] See http://www.ene.gov.on.ca/envision/news/01400mb.html.

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS DECISION

Section 109 of the Clean Air Act requires the Administrator of the Environmental Protection Agency ("EPA") to set National Ambient Air Quality Standards ("NAAQS") for air pollutants in order to protect human health and welfare. 42 U.S.C. 7409. Section 110(a) of the Act provides that, after EPA promulgates these NAAQS, each state is required to prepare a State Implementation Plan ("SIP") which implements the NAAQS. 42 U.S.C. 7410(a). The SIP is reviewed by EPA under Section 110. 42 U.S.C. 7410. Section 110(a)(2) of the Act sets forth criteria that a SIP must satisfy and provides that, if these criteria are met, EPA must approve the proposed plan. 42 U.S.C. 7410(a)(2).

Section 110(k)(5) of the Act provides that, once EPA determines that the "implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport * * * or to otherwise comply with any requirement of this chapter * * *," EPA must issue a rule ("SIP Call") that orders the state to revise and correct its SIP as necessary. 42 U.S.C. 7410(k)(5). Section 307(d) of the Act requires EPA, in issuing a SIP Call under Section 110(k)(5) of the Act, to adhere to its rulemaking procedures, including a formal notice and comment procedure. Section 307(d), 42 U.S.C. 7607(d).

a. The Decision Below Does Not Conflict with This Court's Decision in *Union Electric v. EPA*

In *Union Electric v. EPA*, 427 U.S. 246, 256 (1976), in considering the requirements for SIP's under Section 110(a)(2) of the Clean Air Act, this Court held:

> After surveying the relevant provisions of the Clean Air Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan.

The court of appeals concluded in this case that "[i]n sum, there is nothing in the text, structure, or history of Section 110(a)(2)(D) that bars EPA from considering cost in its application." 213 F.3d at 679. Petitioners Michigan, Alabama, West Virginia, South Carolina, and Virginia (hereafter "Michigan") argue that the decision below conflicts with *Union Electric* because, "in the absence of congressional intent, economic and technological infeasibility shall not be considered by the EPA under section 110(a)(2)." Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-632 (hereafter "Mich. Pet."), p. 14.[9/]

[9/] Michigan is the only petitioner who argues that EPA should be precluded from using cost in Section 110(a)(2). *See* Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-633 of the States of Ohio and Indiana (hereafter "Ohio Pet."), p. 15 ("we argue that considerations of cost-effectiveness should be a secondary factor to * * * air-quality factors under Section 110"); Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-445 of the Appalachian Power Company, *et al.*, p. 12 ("Industry Petitioners do not question that cost is to play a key role in the implementation of the CAA in general and the implementation of the interstate pollutant transport

There is no conflict between *Union Electric* and the decision below.[10/] Michigan incorrectly concludes that "if the EPA was barred from reading cost considerations into the original section 110(a)(2)(E) when approving SIP's, it also must be barred from injecting cost considerations into today's section 110(a)(2)(D)." Mich. Pet. 16. Michigan attempts to extend broadly the *Union Electric* holding to cover any EPA action that relates to Section 110(a)(2) in an attempt to establish a conflict. Michigan's attempt to extend the Court's holding is unpersuasive because both the function that EPA is performing and the issues that are involved in this case are completely different from those in *Union Electric*.

In *Union Electric*, this Court was called upon to examine EPA's approval of a SIP under Section 110(a)(2) of the Act. The Court examined Section 110(a)(2) to decide "whether the operator of a regulated emission source, in a petition for review of an EPA-approved state plan filed after the original 30-day appeal period, can raise the claim that it is economically or technologically infeasible to comply with the plan." 427 U.S. at 249. The Court concluded, based on the "relevant provisions of the Clean Air Act amendments of 1970 and their legislative history," that EPA could not consider claims of economic or technological infeasibility when it reviewed a plan. 427 U.S. at 256. Thus, *Union Electric* addressed only whether a state's SIP met the criteria of Section 110(a)(2).

The present case involves EPA rulemaking under Section 110(k)(5) of the Act, rather than EPA's consideration of a SIP under Section 110(a)(2). Consistent with its

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provisions in particular").

[10/] Significantly, Michigan did not even rely on *Union Electric* in its opening or reply briefs in the court of appeals.

rulemaking authority, EPA first issued a notice of proposed rulemaking that found that emissions from 22 states and the District of Columbia "significantly contribute" to downwind air pollution problems. 62 Fed. Reg. 60,318 (Nov. 7, 1997). EPA required these states to revise their SIP's to "contain adequate provisions" to prevent the emission of pollutants that contribute significantly to the noncompliance of NAAQS's in other states. *Ibid.* The rule proposed that each state was required to eliminate the NOx emission that could be reduced by highly cost-effective measures. *Ibid.* After an extensive notice and comment period, including the issuance of revised and supplemental public notices, EPA issued the finai rule on October 27, 1998. 63 Fed. Reg. at 57,356. As the court of appeals noted, "the fundamental dispute [in this case] is over the clarity of the phrase 'contribute significantly'" in Section 110(a)(2)(D) and how it was defined by EPA in its final rule. 213 F.3d at 679.

Michigan's challenge is not affected by the *Union Electric* holding that EPA cannot consider claims of economic and technological infeasibility when it reviews SIP's. The approval or rejection of SIP's involves an entirely different function and is performed under an entirely different statutory provision than the issuance of a SIP call, such as is involved in this case.

Morever, while EPA considered cost in promulgating the NOx SIP Call Rule, it did not consider any claim of "technological or economic infeasibility." To the contrary, the types of emission control relied upon by EPA in making its determinations in the rule-making were economically and technically feasible. In fact, EPA found them to be "highly cost-effective." 63 Fed. Reg. at 57, 377. Thus, the cost issues in the two cases are entirely different.

b. The Decision Below Does Not Conflict with Prior Decisions of the District of Columbia Circuit

Michigan further asserts that the decision of the Court of Appeals for the District of Columbia Circuit conflicts with its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), and its recent decision in *American Trucking Ass'ns Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Mich. Pet. 19. However, both of those cases involved Section 109 of the Act, not Section 110, which is the section at issue here. The Clean Air Act is a highly complex statute. The fact that in analyzing the statute, the court of appeals concluded that costs may not be considered in setting NAAQS under Section 109, but may be considered in implementing Section 110, creates no conflict among decisions of the Court of Appeals for the District of Columbia Circuit.

In *Lead Industries* and *American Trucking*, which were decided nearly 20 years apart, the court of appeals concluded, based on the plain language of the "statute and its legislative history[,] * * * [that] economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA, supra,* 647 F.2d at 1148; *accord American Trucking Ass'ns Inc. v. EPA, supra,* 175 F.3d at 1040 ("As this court long ago made clear, in setting NAAQS under §109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards" (citing *Lead Industries* and other cases)).

Section 109(b)(1) of the Act, 42 U.S.C. 7409(b)(1), requires EPA to set national ambient air quality standards "which[,] in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite

to protect the public health." That statutory provision is not at issue in this case. Therefore, the court of appeals' conclusions that the statutory language of Section 109, along with its legislative history (*Lead Industries Ass'n v. EPA, supra*, 647 F.2d at 1149-1150), preclude EPA from considering costs in setting NAAQS, is irrelevant to the statutory interpretation of Section 110 of the Act, which is at issue here. Michigan can point to no statutory language or legislative history which would prohibit EPA from considering costs under Section 110(a)(2)(D)(i)(I) of the Act.

In attempting to show a conflict between the decision here and *Lead Industries*, Michigan asserts that, in *Lead Industries*, the court "reviewed Section 110" and stated that, "if Congress had wanted the economics of pollution control considered[,] it would have so provided in Section 110." Mich. Pet. 20, citing *Lead Industries*, 647 F.2d at 1149, n. 37. However, this statement in a footnote does not show any conflict between *Lead Industries* and the decision here.

First, the footnote is dictum. Section 110 of the Clean Air Act was not under consideration by the Court in *Lead Industries*.

Second, even if the footnote were not dictum, taken in context, it does not conflict with the decision below. In relevant part, the footnote states (647 F.2d at 1149, n. 37):

> Similarly, § 110, 42 U.S.C. 7410, provides that once ambient air quality standards have been promulgated, each state must prepare and submit an implementation plan outlining the measures to be taken to ensure that the standards are met. It is these state

> implementation plans which actually impose pollution control requirements and, consequently, if Congress had wanted the economics of pollution control considered it would have so provided in § 110. While states may consider economic and technological feasibility in selecting the mix of control devices, they may do so only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards. Section 110(a)(2), 42 U.S.C. 7410(a)(2). [emphasis added]

Michigan's citation of the footnote from *Lead Industries* omits the last sentence, which is emphasized above. This sentence is obviously critical. The court of appeals explicitly stated that under Section 110, "states may consider economic and technological feasibility in selecting the mix of control devices * * * only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards." 647 F.2d at 1149, n. 37.

In this case, the strict deadlines for attainment of the NAAQS requirement for ozone have not been met. 63 Fed. Reg. at 57,446-57,447 (1998). EPA issued the NOx SIP Call Rule because the states had failed in their existing SIP's to control adequately NOx emissions which prevent attainment of the ozone NAAQS in downwind states. Thus, the very purpose of the NOx SIP Call Rule is to ensure compliance with the ozone NAAQS. Here, EPA's use of cost considerations was not in setting ambient air quality standards, but in determining how the standards will be implemented.

There is nothing in *Lead Industries* to support Michigan's view that, after EPA has identified the states whose NOx emissions are harming other states, EPA may not use cost considerations in setting the level of controls to be applied. EPA has concluded that applying the level of controls called for in the NOx SIP Call Rule will have an "appreciable impact" on downwind nonattainment, and that the required reductions in NOx emissions are not "more than is necessary to ameliorate downwind nonattainment." 63 Fed. Reg. 57, 403, 57,446-57,447 (1998). EPA's actions under Section 110 in this case are therefore consistent with the dictum in *Lead Industries*.

Michigan makes no claim that the *American Trucking* case even discusses Section 110 of the Clean Air Act. Mich. Pet. 19-21. Instead, Michigan alleges that a conflict exists because the court of appeals held that EPA may not consider costs in setting standards to protect public health and welfare under Section 109(d) of the Act in *American Trucking*, but that it may consider costs in the context of Section 110 in this case. Mich. Pet. 19-20. However, as we have seen, in *Lead Industries*, *supra*, 647 F.2d at 1149-1150, which has been consistently followed in the District of Columbia Circuit, the court of appeals based its conclusion that costs may not be considered in setting NAAQS under Section 109 on the statute's plain language and legislative history. Michigan makes no showing that Section 110's plain language and legislative history compel the same result. Therefore, no conflict exists between this case under Section 110 and *Lead Industries* and *American Trucking* under Section 109.

In any event, a conflict of decisions within a Circuit, even if it existed, would be no basis for granting a writ of certiorari. Such conflicts can be corrected by rehearings *en banc* within the Circuit. Petitioners, in fact, asked for rehearing

en banc, but did not rely on the alleged intra-circuit conflict. There is certainly no reason for a writ of certiorari to be granted on this basis.

c. EPA's Rule Does Not Conflict with State Sovereignty or the Act's Statutory Framework of Cooperative Federalism as Interpreted by This Court in *Train v. NRDC*

The Michigan and Ohio petitioners also argue broadly that EPA intruded on state sovereignty and cooperative federalism when it issued the NOx budget program in its Final Rule. Mich. Pet. 22; Ohio Pet. 9.

Michigan and Ohio claim that state sovereignty and cooperative federalism are offended because the NOx SIP Call Rule may cause a state, which contributes less to a particular area's ozone nonattainment than another state, to have to reduce more NOx emissions than the state which has contributed more. Michigan and Ohio use the example that Indiana contributes less than Pennsylvania to New York City's ozone nonattainment. Mich. Pet. 22-23; Ohio Pet. 12-13. Indiana, whose NOx emitters have not applied the same level of pollution control devices to their smokestacks as have Pennsylvania's emitters, will be able to achieve more highly cost-effective reductions in NOx emissions than Pennsylvania. Thus, under the budget set by EPA in the Rule, Indiana will be required to reduce its NOx emissions more than Pennsylvania.

Michigan and Ohio argue that this effect on Indiana offends state sovereignty and the system of cooperative federalism set forth by Congress in the Clean Air Act. Since Pennsylvania contributes more to New York City's nonattainment than does Indiana, Michigan and Ohio argue that

Pennsylvania should be required to reduce its emissions more. Mich. Pet. 24-25; Ohio Pet. 12-13. Michigan bases its argument on Section 110(k)(5) of the Act, 42 U.S.C. 7410(k)(5), which requires that once EPA has concluded that a SIP is inadequate, "the Administrator shall require the State as necessary to correct such inadequacies." Mich. Pet. 24. Michigan asserts that EPA's regulatory choices are "illogical" because, under the budgets set in the NOx SIP Call Rule with respect to New York City, Indiana will be controlling more NOx than is "necessary" and Pennsylvania will be controlling less NOx than is "necessary." *Ibid.*

Although Michigan and Ohio cast their argument as one of state sovereignty and cooperative federalism, it is really an argument concerning the wisdom of EPA's regulatory approach. In addressing the complicated problem of interstate ozone transport, where each state's NOx emissions have effects on the attainment of ozone air quality standards in numerous other states, it was appropriate for EPA to make the determination of the amount of NOx emissions from a state which "contribute significantly" and are necessary to be reduced to correct the inadequacy of the state's SIP. Under *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 845 (1984), the courts may not substitute their judgment for that of the agency, but must determine "whether the Administrator's view that [the regulatory choice] is appropriate in the context of this particular program is a reasonable one." The court of appeals properly concluded here that it had "no basis to upset EPA's judgment." 213 F.3d at 680.

The well-established law concerning the federal-state division of responsibilities under the Clean Air Act shows that EPA has acted fully within that authority in issuing the NOx SIP Call Rule. In *Train v. NRDC*, 421 U.S. 60, 79 (1975), this

Court recognized that EPA is "plainly charged by the Act with responsibility for setting the national ambient air standards," but was "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." The Court further stated that "so long as the ultimate effect of a State's choice of limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Ibid.* This is exactly what EPA has allowed states to do in the NOx SIP Call Rule.

EPA made clear that a state could use any emissions control measure it wanted to achieve the NOx budget requirement. *See* Final Rule, 63 Fed. Reg. at 57,368. Under the budget plan, a state "may choose from a broader menu of cost-effective, reasonable alternatives" including alternatives that "may even be more advantageous in light of local concerns." *Id.*, pp. 57,369-57,370. Furthermore, EPA stated that the states have "full discretion in selecting the controls, so that [the states] may choose any set of controls that would assure achievement of the budget." *Id.*, p. 57, 378. Finally, each state has the option to adopt an interstate trading program that allows it to purchase NOx "allowances" from sources that have elected to over-control, as well as the option, under certain circumstances, of "banking" allowances from prior years so that it can meet emissions limits. *Id.*, p. 57,430. Thus, EPA allowed the states substantial discretion in carrying out their responsibilities under the Act.

Michigan argues in conclusion that certiorari should be granted because, in its view, there are other ways to improve public heath and the nation's air quality than those to be implemented under the NOx SIP Call Rule. Mich. Pet. 28.

Michigan is making a policy argument. This Court has made clear that such arguments must be addressed to Congress or to the agency, and not to the courts (*Chevron v. NRDC, supra,* 467 U.S. at 865):

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. [footnotes omitted]

This is exactly the situation presented here and concerns the same statute the Court considered in *Chevron v. NRDC, supra.* The petitioners have presented no grounds for a grant of certiorari.

* * *

Ontario and the majority of the states subject to the NOx SIP Call Rule share a common airshed. Because of geography, chemistry, and weather, Ontario is directly affected by NOx emissions and ozone transported from the subject states. While no government can change geography, chemistry or weather, governments can work together to reduce emissions of NOx into our common airshed and protect health and the environment. The NOx SIP Call Rule is an important step for such purposes. The Rule reflects sound and sensible policy choices designed to ameliorate a complex air pollution problem. Ontario strongly supports the Rule before this Court.

CONCLUSION

For these reasons, and for those set forth by the other respondents, Ontario respectfully submits that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 4, 2001

Nos. 00-445, 00-632 and 00-633

In the Supreme Court of the United States

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATES OF OHIO AND INDIANA, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency, in promulgating a final rule respecting implementation of a National Ambient Air Quality Standard under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, reasonably determined that it may consider the cost-effectiveness of available pollution controls as a factor in identifying "upwind" State air pollution emissions that "contribute significantly" to nonattainment of the standard in "downwind" States.

2. Whether the court of appeals properly determined that the Environmental Protection Agency's authority under the relevant provisions of the Clean Air Act is sufficiently defined to satisfy the nondelegation doctrine.

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In the Supreme Court of the United States

No. 00-445

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 00-632

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 00-633

STATES OF OHIO AND INDIANA, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 213 F.3d 663.

[1] This brief responds to three petitions for certiorari filed in this case: (1) *Appalachian Power Co.* v. *EPA*, No. 00-445 (filed Sept. 20, 2000) (APC Pet.); *Michigan* v. *EPA*, No. 00-632 (filed Oct.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. Petitions for rehearing were denied on June 22, 2000 (Pet. App. 62a-65a). The petition in No. 00-445 was filed on September 20, 2000. The Chief Justice extended the time for the States to file their petitions for a writ of certiorari to and including October 20, 2000, and the petitions in Nos. 00-632 and 00-633 were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals arising from an Environmental Protection Agency (EPA) rulemaking under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* The CAA, among other things, directs EPA to develop National Ambient Air Quality Standards (NAAQS) and encourages States to implement the NAAQS through State Implementation Plans (SIPs). 42 U.S.C. 7410. EPA promulgated a rule, known as the "NOx SIP Call," that required the SIPs of 22 States and the District of Columbia to be revised to mitigate the interstate transportation of ozone. See 63 Fed. Reg. 57,356 (1998). Numerous petitioners challenged EPA's rule through consolidated petitions for review, and the court of appeals granted the petition in part, but largely rejected petitioners' objections to the rule. See Pet. App. 1a-61a.

1. The NOx SIP Call requires certain States (in order for their SIPs to remain acceptable under the Act) to develop plans to reduce emissions of ozone

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20, 2000) (Michigan Pet.); and *Ohio & Indiana* v. *EPA*, No. 00-633 (filed Oct. 20, 2000) (Ohio Pet.). For convenience, all citations to "Pet. App." refer to APC's petition appendix.

precursor air pollutants that contribute significantly to nonattainment of the NAAQS for ozone in "downwind" States. See generally 63 Fed. Reg. at 57,356. Ground-level ozone, which causes adverse health effects, is created from the chemical reactions of precursor pollutants in sunlight. *Id.* at 57,359. For nearly two decades, scientists have accumulated evidence that the wind-borne movement of nitrogen oxides (NOx) and other ozone precursors, often over long distances, contributes to serious downwind ozone problems, most notably in many of the major eastern urban centers. *Ibid.* The NOx SIP Call represents the culmination of a multi-year effort by Congress, EPA, and the States to develop solutions to that chronic interstate ozone pollution problem. See Pet. App. 8a-12a.

2. The CAA makes "the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). EPA is authorized to set NAAQS for air pollutants at levels requisite to protect public health and welfare. 42 U.S.C. 7409. EPA has established NAAQS for several pollutants, including ozone. 40 C.F.R. 50.9, 50.10. Once EPA promulgates a NAAQS, each State's SIP must provide for its implementation, maintenance and enforcement. 42 U.S.C. 7410(a). If the Administrator of EPA finds that an approved SIP is "substantially inadequate" to attain or maintain the NAAQS, mitigate adequately "interstate pollutant transport," or otherwise comply with the CAA, she is authorized to "require the State to revise the plan as necessary to correct such inadequacies" (*i.e.*, issue a "SIP Call"). 42 U.S.C. 7410(k)(5). Section 110(a)(2)(D) of the CAA, 42 U.S.C. 7410(a)(2)(D), sometimes referred to as the "good neighbor" provision, requires that all SIPs, *inter alia*, prohibit emissions of air pollutants

in amounts that would "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any * * * [NAAQS]."

3. On November 7, 1997, EPA issued a notice of proposed rulemaking for the NOx SIP Call, finding that 22 States and the District of Columbia (for convenience, the "23 States") significantly contribute to nonattainment of the ozone standard in downwind areas within the meaning of the CAA's good neighbor provision. 62 Fed. Reg. 60,318, 60,320 (1997).[2] At the same time, EPA proposed to require each of the 23 States to revise its SIP to demonstrate that total emissions, within each State, of NOx—the most significant ozone precursor responsible for ozone transported to other States—would be reduced by the amounts determined to be significant and, therefore, would not exceed an assigned NOx emissions "budget" established by EPA. *Ibid.* EPA published the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. Like the proposal, the final rule determined that the 23 States contribute significantly to downwind ozone nonattainment and required each of those States to submit SIP revisions containing control measures sufficient to meet the State's NOx budget. 40 C.F.R. 51.121(e)(1).

4. The final rule was premised, first and foremost, on state-of-the-art computer modeling of air quality, showing which upwind States were, in fact, substantial enough contributors to nonattainment of the "1-hour"

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[2] The 23 States were Alabama, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. 62 Fed. Reg. at 60,320.

ozone standard in downwind areas to warrant inclusion in the SIP Call.[3] For the proposal, EPA relied heavily on modeling performed between 1995 and 1997 by the Ozone Transport Assessment Group (OTAG), a work-group with representatives from States, industry, environmental organizations, and EPA. See Pet. App. 12a-13a. In response to comments arguing that the OTAG modeling utilized for the proposal was not specific enough, EPA conducted additional, state-specific air-quality modeling using two different modeling techniques. *Id.* at 13a. From that modeling, EPA compiled detailed data summaries showing the magnitude, frequency, and relative amount of each upwind State's emissions contributions to each downwind nonattainment problem being studied. *Id.* at 16a. That additional air quality analysis, fully documented in the record for the final rule, confirmed EPA's proposed "significant contribution" finding as to the 23 States. *Id.* at 13a; 63 Fed. Reg. at 57,384. As the court of appeals correctly noted, in the course of the present litigation, "no one quarrel[ed] either with [EPA's] use of multiple measures, or with the way it drew the line at this stage." Pet. App. 16a.

5. EPA then examined the cost-effectiveness of available emissions controls in each of the 23 upwind

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[3] In the final rule, EPA also independently analyzed the need for the SIP Call under an "8-hour" ozone standard that EPA issued in 1997. See generally Pet. App. 6a-7a. However, in light of the ongoing challenge to the 8-hour ozone standard in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027, reh'g granted in part and denied in part, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 120 S. Ct. 2003, 2193 (2000) (*ATA*), EPA stayed the findings for the SIP Call under the 8-hour standard, and the court of appeals accordingly limited its review to the support for the SIP Call under the 1-hour standard. Pet. App. 7a-8a.

States as part of its analysis in determining the amount of the State's emissions that were considered to "contribute significantly" to downwind nonattainment, as well as the corresponding emission reductions that were needed to eliminate the significant contribution. The remaining emissions became each of those States' "NOx budgets," *i.e.*, the maximum amount of NOx emissions expected after the States implement controls necessary to eliminate the "significantly contributing" emissions. Pet. App. 16a-17a. In effect, EPA set each State's NOx budget to reflect the amount of "highly cost-effective" NOx emissions reductions EPA believed would be available in that State. *Id.* at 17a; 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. For purposes of that analysis, which included review of extensive emissions control data, EPA determined that "highly cost-effective" NOx emissions reductions are those that cost no more than $2,000 per ton of NOx reduced. Pet. App. 17a. EPA emphasized, however, that, in developing SIP revisions to meet the NOx budgets, States would be free to rely on any NOx emission control measures they deemed appropriate, whether or not they were the same controls assumed by EPA in developing the budgets. *Id.* at 42a; 63 Fed. Reg. at 57,369-57,370, 57,378.

EPA tested the efficacy of the proposed NOx emissions budgets through further rounds of air quality modeling. First, it conducted additional computer modeling to ensure that the budgets would produce appropriate downwind air quality improvements. See 63 Fed. Reg. at 57,379. That modeling confirmed that the required reductions would, in fact, allow downwind ozone nonattainment areas to make "appreciable progress towards attainment" and would not result in any instances of "overkill," *i.e.*, upwind emissions reductions

that "are more than necessary to ameliorate downwind nonattainment in every downwind area affected by that upwind State." *Ibid.* EPA also compared the air quality and cost impacts of its proposed approach to alternative approaches premised, for example, on "varying levels of controls in different parts of the 23 jurisdictions." *Id.* at 57,423. EPA concluded, however, that none of those alternatives would "provide either a significant improvement in air quality or a substantial reduction in cost." Pet. App. 26a (quoting 63 Fed. Reg. at 57,423). The court of appeals noted that petitioners "offer[ed] no material critique of EPA's methodology in reaching this answer." Pet. App. 26a.

6. Various States and industry groups challenged the NOx SIP Call through consolidated petitions for review in the court of appeals. Other States, industry groups, and environmental groups intervened in support of the rule. The petitions raised myriad issues, including the two issues that provide the basis for the petitions for writ of certiorari: (1) whether cost-effectiveness of emissions controls may be considered in determining what level of emissions contributions are "significant"; and (2) whether the CAA or EPA's interpretations of its provisions are so undefined as to violate the nondelegation doctrine. The court denied all of the petitions for review on those and other major issues. Pet. App. 1a-56a. It vacated, however, certain relatively minor aspects of the rule, which are not at issue here.[4] Judge Sentelle dissented. He concluded

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[4] On the basis of certain discrete record issues, the court of appeals vacated the SIP Call as it applied to Wisconsin, Missouri, and Georgia. The court also remanded the rule for EPA to reconsider issues respecting the definition of an electric generating unit and a change in the control level assumed for large stationary internal combustion engines. Pet. App. 56a.

that the relevant provisions of the CAA do not allow EPA to consider cost of controls at all, and he would have vacated the entire rule on that basis. *Id.* at 57a-61a. Petitioners sought rehearing and rehearing en banc, primarily on the grounds articulated in the dissent, but the court of appeals denied those petitions. *Id.* at 62a-65a. Judge Sentelle would have granted the petitions. *Ibid.*

ARGUMENT

The court of appeals correctly ruled that EPA may consider the cost-effectiveness of pollution controls in determining which emissions contribute significantly to nonattainment of the ozone standard in downwind areas. That statutory ruling is correct, does not conflict with any decision of this Court or any other court of appeals, and accordingly does not warrant review by this Court. The court of appeals also was correct in holding that neither the relevant provisions of the CAA nor EPA's actions violate the nondelegation doctrine. While the court of appeals' analysis was premised, in part, on a decision of that court that the federal government has challenged in *Browner* v. *American Trucking Associations* (*ATA*), No. 99-1257 (argued Nov. 7, 2000), the judgment reached by the court of appeals is correct and does not warrant further review, regardless of this Court's decision in *ATA*.[5]

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[5] APC and Ohio suggest that the Court may wish to defer action on their petitions pending a decision in *ATA*. APC Pet. i n.*; Ohio Pet. 16 n.8. That action is not warranted as to either the nondelegation issue or the cost issue in this case. The court of appeals adopted a novel nondelegation standard in *ATA*, *supra*, at 1027, and the federal government has challenged that ruling in *Browner* v. *ATA*, No. 99-1257. The court of appeals in this case, however, has rejected petitioners' nondelegation argument, even

1. The NOx SIP Call is EPA's effort to implement the CAA provisions that address an interstate problem —the accumulation of ozone, which, for example, blankets the northeastern United States on warm summer days as a result of air pollution emitted by numerous sources in nearly two dozen States east of the Mississippi River. EPA identified, through sophisticated air quality modeling, those States that contribute to that problem, and it then identified as "significant contributions" those emissions in excess of what the emission levels would be if all of the contributing States imposed the same level of highly cost-effective emission controls on their sources.

As we have explained in *ATA* v. *Browner*, No. 99-1426, the Clean Air Act prohibits consideration of the projected cost of pollution controls when establishing NAAQS, but generally allows those costs to be considered at the implementation stage. See Br. for Fed. Resp'ts at 5-7, 17-31, 45-47, *ATA* v. *Browner*, *supra*. In accordance with that overall statutory structure, EPA has reasonably construed the relevant provisions of the Act—Section 110(a)(2)(D) and

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under its *ATA* ruling. Pet. App. 26a-28a. The relevant provisions of the CAA would satisfy nondelegation requirements under any plausible standard. See pp. 20-22, *infra*. The cross-petitioners in *ATA* v. *Browner*, No. 99-1426, contend that the CAA requires EPA to consider the costs of pollution control when setting NAAQS. Petitioners in this case contend, however, that the CAA precludes EPA from considering those costs when determining how to implement the CAA's trans-boundary pollution provisions set out in Section 110(a)(2)(D), 42 U.S.C. 7410(a)(2)(D). If the cross-petitioners in *ATA* prevail on their cost issue, that result would weaken, rather than bolster, petitioners' cost argument in this case. And if the *ATA* cross-petitioners do not prevail on their cost issue, that result would preserve the state of the law that provided the basis for the court of appeals' decision in this case.

(k)(5)—to allow consideration of cost-effectiveness of controls in determining which contributions to the interstate ozone problem are "significant[]" for purposes of the NOx SIP Call. See 42 U.S.C. 7410(a)(2)(D) and (k)(5). The court of appeals properly upheld EPA's determination. Petitioners' challenges rely heavily on mistaken characterizations of the manner in which EPA considered costs in the rulemaking. Because the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals, petitioners' challenge to EPA's construction of the relevant provisions of the CAA presents no issue warranting this Court's review.

a. The petitions for writ of certiorari rest largely on the mistaken assertion that the NOx SIP Call "rel[ies] on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute 'significantly' to another state's ozone nonattainment air quality." APC Pet. 14; see also, *e.g.*, Michigan Pet. 12; Ohio Pet. 5-6. To the contrary, EPA focused on air quality—not cost—as the principal basis for determining which States have total emissions with sufficient impacts on downwind ozone nonattainment to warrant inclusion in the SIP Call. EPA's determinations were premised on state-specific, multi-dimensional, air-quality modeling analyses that were fully documented in the administrative record and mostly unchallenged in this case. See pp. 4-7, *supra*; Pet. App. 12a-14a, 16a; 63 Fed. Reg. at 57,384, 57,387-57,398.[6]

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[6] That modeling allowed EPA to make careful, air-quality-based distinctions among all upwind States whose emissions could potentially impact a particular downwind area. In many instances, EPA determined that the ambient impacts downwind from a particular upwind State's emissions were so small as to not be "significant" with regard to particular downwind nonattainment pro-

As the court of appeals correctly recognized, only after those determinations were made did EPA examine the amount of highly cost-effective NOx emissions reductions available to develop the NOx budgets. Pet. App. 16a-17a; see also 63 Fed. Reg. at 57,377-57,378. That analysis was the principal factor only in determining the *subset* of each relevant upwind State's total NOx emissions that should be eliminated as the "significant contribution" to downwind nonattainment. See Pet. App. 16a-17a. Furthermore, after EPA derived the proposed NOx budgets, EPA conducted *additional* air quality modeling, again fully documented in the record and mostly unchallenged in this case. The modeling showed that the required emissions reductions, as a whole, would have an "appreciable impact" on downwind nonattainment and that there is no instance where a required upwind emission reduction is "more than necessary to ameliorate downwind nonattainment." 63 Fed. Reg. at 57,403, 57,446-57,447.[7]

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blems. See, *e.g.*, 63 Fed. Reg. at 57,392-57,394 (comparing modeling data for upwind States that were, and were not, found to contribute "significantly" to New York City's nonattainment problem). The court of appeals pointed out that petitioners "really [did] nothing more than quibble" with EPA's modeling, and "no one quarrel[ed]" with the overall analytical approach used by EPA to interpret the data and determine significant contributions of upwind States. Pet. App. 13a, 16a. One South Carolina utility company did object to EPA's findings respecting air quality modeling for the State of South Carolina, but the court's specific rejection of the utility's arguments illustrates the soundness of the air quality modeling that EPA performed at that stage of its analysis. See *id.* at 36a-37a.

[7] EPA determined that, even after implementation of the SIP Call, some "residual nonattainment" would likely persist for at least one downwind area linked to each upwind State. See 63 Fed. Reg. at 57,404, 57,447. Thus, if anything, EPA erred on the side of

Accordingly, and contrary to petitioners' suggestions, the question presented in this case is *not* whether EPA may base a SIP Call exclusively (or primarily) on cost, rather than air quality, considerations. Rather, the question is whether EPA may use cost analyses to help develop a fair, practical, and effective regulatory approach supported—and bounded—by extensive and mostly undisputed air quality modeling. The court of appeals correctly answered that question.

b. The court of appeals ruled, on the basis of the CAA and its legislative history, that EPA reasonably construed Section 110(a)(2)(D). See Pet. App. 15a-25a. EPA concluded that, when determining the amount of each upwind State's emissions that "contribute significantly to nonattainment" in downwind States (42 U.S.C. 7410(a)(2)(D)), EPA could consider the level of emission reduction that could be achieved in the upwind States through cost-effective control measures. The CAA neither requires nor prohibits EPA's consideration of that sensible benchmark as part of the process for solving a complex, and highly fact intensive, interstate pollution problem. As the court of appeals properly recognized, EPA's approach represents a reasonable construction of its obligations under the relevant provisions of the CAA. See *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984).[8]

In upholding EPA's construction of the statute, the court of appeals correctly observed that "[t]he term

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under-control rather than over-control. EPA stated that it would continue to monitor the progress made on ozone nonattainment and, if necessary, "may establish new budget levels and allocation mechanisms for the post-2007 timeframe." 63 Fed. Reg. at 57,428.

[8] The court of appeals correctly noted that no party argued (and the court did not hold) that EPA was *required* to consider costs under Section 110(a)(2)(D). Pet. App. 17a-18a, 22a.

'significant' does not in itself convey a thought that significance should be measured in only one dimension." Pet. App. 21a.[9] The court explained that EPA is justified in construing the term "significant" to allow for consideration of emission control costs when making regulatory decisions in the context presented here. See *id.* at 21a-25a. Furthermore, the CAA's legislative history indicates that, at least since 1977, Congress has anticipated the need to take account of pollution control costs and the economic incentives of the States that contribute to, or are affected by, interstate pollution.[10] EPA's approach fulfills Congress's objective to ameliorate the impact of interstate pollutant transport and to do so in a way that equitably distributes the burdens borne by all the States that are contributors to this complex, regional problem.

c. Petitioners are mistaken in suggesting that EPA's approach conflicts with other decisions of the courts of appeals. See APC Pet. 17-19; Michigan Pet. 11-12. They essentially argue, based on Judge Sentelle's dissent, that Congress clearly intended to

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[9] At least one of the petitioners appears to agree with this statement. See Ohio Pet. 10 ("It is true, as the court of appeals noted, that the term 'significant' is inherently open-ended and is susceptible of an interpretation that would consider costs of reduction as one of several factors in measuring 'contributions' that require a regulatory response.").

[10] See S. Rep. No. 95-127, 95th Cong., 1st Sess. 41-42 (1977) (noting the need to address the "serious inequities among several States, where one State may have more stringent [SIP] requirements than another State," and to "equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State"); see also *id.* at 42 (noting that "plants in States with more stringent control requirements" are subject to a "distinct economic and competitive disadvantage").

preclude consideration of costs under Section 110(a)(2)(D). See Pet. App. 59a-60a. The court of appeals correctly rejected petitioners' contention. Judge Sentelle relied on cases such as *American Petroleum Institute* v. *EPA*, 52 F.3d 1113 (D.C. Cir. 1995), and *Ethyl Corp.* v. *EPA*, 51 F.3d 1053 (D.C. Cir. 1995), which recognize that, where a statutory provision unambiguously confines an agency's authority to the satisfaction of a specified goal, or to the consideration of a specified factor, the agency is not at liberty to take regulatory action under that provision to effectuate other goals, or to base its decision on other factors.[11]

EPA did not violate that principle. EPA properly focused the NOx SIP Call on the precise air quality issue that is the subject of Section 110(a)(2)(D)—the elimination of emissions that "contribute significantly" to nonattainment of the NAAQS in downwind States. EPA merely considered emission control costs as part of its analysis. This case therefore does not pose the question whether EPA can take regulatory action premised on a goal or factor different from that set forth in the relevant statutory provision, nor whether EPA has taken action exceeding its statutory authority. See APC Pet. 16 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Rather, the question here is simply whether EPA may consider costs as part of an effort to give meaningful effect to an undefined term in the relevant provision—in this case, the phrase "contri-

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[11] See *American Petroleum Inst.*, 52 F.3d at 1119 (finding that the relevant statutory provisions unambiguously required that regulation be "directed toward the reduction of VOCs and toxics emissions"); *Ethyl Corp.*, 51 F.3d at 1058 (finding that the relevant statutory provisions unambiguously confined fuel additive waiver determination to effects of additive on emission control devices).

bute significantly to nonattainment." See Pet. App. 21a ("The fundamental dispute is over the clarity of the phrase 'contribute significantly.'"). As the court of appeals correctly recognized, that court's previous decisions support EPA's determination. See *id.* at 21a-24a.

The court of appeals appropriately focused on cases such as *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc). See Pet. App. 23a-24a. In *NRDC*, the court considered challenges to EPA's use of emission control costs in setting an emission standard for vinyl chloride, which the CAA regulates as a "hazardous" air pollutant. See CAA § 112, 42 U.S.C. 7412 (1994 & Supp. IV 1998). Section 112 provided, at that time, that hazardous pollutant emission standards were to be set "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health." 824 F.2d at 1148. The court of appeals ruled that EPA may consider emission control costs in making that determination, explaining that "the phrase 'to protect the public health' evinces an intent to make health the primary consideration," but that nothing in the statute or its legislative history indicated any congressional intent to preclude consideration of costs. *Id.* at 1155.[12]

The court of appeals in this case noted that it has routinely applied its approach in *NRDC* to determine when an agency may consider costs when making regu-

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[12] The court of appeals ultimately remanded EPA's vinyl chloride rule because the court found that EPA had "*substituted* technological feasibility for health as the primary consideration." 824 F.2d at 1164 (emphasis added); see also APC Pet. 7 (discussing that aspect of the court's decision). That concern, however, is not present in this case. EPA's consideration of costs was only one component of its overall effort to implement Section 110(a)(2)(D)'s air quality goals.

latory decisions. See Pet. App. 22a-23a.[13] Petitioners have failed to identify, either here or in the proceedings below, any persuasive evidence that Congress intended to preclude EPA from considering costs under Section 110(a)(2)(D). See *id.* at 24a-25a.[14]

d. There is no merit to the contentions of Michigan and Ohio that EPA's regulatory approach represents an improper intrusion on state sovereignty. See Ohio Pet. 9-16; Michigan Pet. 14-19, 22-28. While the States' arguments are somewhat ambiguous, they seem to focus on Section 110(k)(5)'s direction that EPA shall call for revision of a State's SIP "as necessary to correct * * * inadequacies." Ohio Pet. 11; Michigan Pet. 24-25. In petitioners' view, EPA's analytical approach was so blunt that it required some States to reduce emissions

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[13] See, *e.g.*, *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 622-624 (1998) (although improvement in air quality is the "overall goal" of the CAA gasoline anti-dumping provisions, EPA permissibly considered economic factors since nothing "in the text or structure" of the statute precluded such consideration), amended on other grounds, 164 F.3d 676 (D.C. Cir. 1999); *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (FAA properly considered economic impacts on air tour industry as factor in developing regulation under statute providing for "substantial restoration of natural quiet" in Grand Canyon National Park), cert. denied, 526 U.S. 1158 (1999).

[14] In the court of appeals proceedings, petitioners advanced conflicting theories of the extent to which Section 110(a)(2)(D) allows consideration of costs. See Pet. App. 17a-20a. That divergence continues here. Compare APC Pet. 16 (consideration of costs precluded), and Michigan Pet. 8 (same), with Ohio Pet. 15 (costs may be considered, but only as a "secondary consideration"). As the court of appeals aptly observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say there is 'clear congressional intent to preclude consideration of cost' under 110(a)(2)(D)." Pet. App. 20a (quoting *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc)).

more than "necessary," while other States are tasked with reducing emissions less than "necessary." Ohio Pet. 11-14; Michigan Pet. 25. Petitioners essentially contend that EPA erred by not tailoring state NOx budgets more precisely to the modeled impact of each State's emissions on downwind nonattainment areas.[15]

The court of appeals properly rejected the gist of that argument on the basis of the rulemaking record. See Pet. App. 25a-26a. The court observed that, before selecting a relatively uniform analytical approach to calculate each State's NOx budget, EPA also modeled approaches that introduced more regional variations, similar to the approaches that petitioners now suggest. *Ibid.* EPA found that the non-uniform approaches provided no significant advantages over the uniform approach, in terms of either air quality or cost, and that "[t]he complaining states offer[ed] no material critique of EPA's methodology in reaching this answer." *Id.* at 26a. The court correctly recognized that any regulatory approach to an exceedingly complex interstate air pollution problem could be attacked as having some imprecision, particularly when viewed from a parochial perspective. EPA considered various approaches and reasonably selected one that struck an appropriate balance among the relevant technical considerations.

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[15] While petitioners presented similar factual arguments to the court of appeals, they were not presented in federalism terms. The States' federalism arguments below rested on a more sweeping assertion that EPA's decision to establish NOx budgets, in and of itself, inappropriately restricted the States' prerogatives to choose emission control strategies. Pet. App. 37a-43a. The court of appeals rejected that argument, and the States do not directly challenge that aspect of the court decision here.

See *ibid.*; see also, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989).[16]

e. There also is no merit to Michigan's argument that EPA's consideration of cost-effectiveness of emission controls in the NOx SIP Call conflicts with this Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). See Michigan Pet. 14-19. Michigan contends that in *Union Electric*, the Court held that a SIP revision submitted under Section 110(a)(2), 42 U.S.C. 7410(a)(2), may be evaluated only on the basis of whether it meets the minimum conditions identified in subparagraphs (A) to (H) of that provision and that none of those minimum conditions includes consideration of economic or technological feasibility. See Michigan Pet. 15 (citing *Union Elec.*, 427 U.S. at 257).

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[16] The complexity of developing a more "variable" type of approach is apparent from the record. Each of the States subject to the SIP Call was found to contribute "significantly" to 1-hour ozone nonattainment in numerous (in some cases, as many as a dozen or more) downwind States, and many "upwind" States are themselves "downwind" receivers of pollution contributions from other States. See 63 Fed. Reg. at 57,394-57,395. Overall, EPA found that there were more than 150 significant upwind-to-downwind state pollution contribution linkages under the 1-hour ozone standard. See *ibid.* (Table II-5). Furthermore, the magnitude, frequency, and relative amount of the air pollution contributions underlying each of those linkages varies considerably. See, *e.g.*, *id.* at 57,396-57,398 (examples of modeling data for linkages). Petitioners do not identify any alternative approach from the administrative record that would adequately address all the complex dimensions of this regional problem. Instead, petitioners suggest that EPA's approach is imprecise based on selective comparisons that fail to grapple with the larger and more complex problems that EPA needed to address. See, *e.g.*, Ohio Pet. 12-13 (comparing Indiana/New York and Pennsylvania/New York linkages); Michigan Pet. 22-23 (same).

Michigan's understanding of *Union Electric* is incorrect.

The Court's *Union Electric* decision addressed a sulfur dioxide SIP submitted under the requirement of Section 110(a)(2)(A)(i), which provided, at that time, that each State must formulate a SIP to achieve the primary NAAQS "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." 427 U.S. at 249-251. The Court stated in broad terms that "Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a [SIP]." *Id.* at 256. But the Court also made clear that its holding concerning economic and technological feasibility was focused on the type of SIP revision at issue. *Id.* at 265 ("In sum, we have concluded that claims of economic or technological infeasibility may not be considered by the Administrator *in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years.*") (emphasis added). *Union Electric* expressly recognized that consideration of "[e]conomic and technological factors" may be appropriate in circumstances other than those directly at issue in that case. *Id.* at 264-265 n.13. Michigan is accordingly mistaken in suggesting that *Union Electric* precludes EPA from considering economic and technological factors when taking actions under Section 110(a)(2)(D).[17]

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[17] Michigan's reliance on *Train* v. *NRDC*, 421 U.S. 60, 79 (1975), is similarly misplaced. See Michigan Pet. 25. The *Train* decision—which held that certain amendments to SIPs should be treated as "revisions" and not as "postponement[s]" and, therefore, should be subject to more relaxed statutory requirements under the version of the CAA then in effect, 421 U.S. at 98-99—has no direct bearing on the issues presented here.

2. APC alone objects to the court of appeals' decision on nondelegation grounds. See APC Pet. 19-21. As APC recognizes, the court of appeals recently relied on the nondelegation doctrine to invalidate EPA's promulgation of revised ozone and particulate matter NAAQS. See *ATA*, *supra*. This Court has granted the federal government's petition for a writ of certiorari challenging the court of appeals' *ATA* decision. See *Browner* v. *ATA*, No. 00-1297. Regardless of the outcome of that case, the court of appeals was correct in ruling that Section 110(a)(2)(D) does not violate the nondelegation doctrine.

The court of appeals concluded that its *ATA* ruling, which requires agencies to identify an "intelligible principle" when exercising discretion under broad statutory grants, applies only to agency action that has nationwide effect. See Pet. App. 26a-27a. The court rejected petitioners' nondelegation challenge primarily on the ground that EPA's interpretation of Section 110(a)(2)(D) has "confined the statute to a modest role." *Id.* at 28a. The Court need not rely on that particular distinction, however, because Section 110(a)(2)(D) is constitutional under any reasonable view of the nondelegation doctrine. This Court's decisions recognize that the nondelegation doctrine is satisfied if a statutory grant of authority itself sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." See *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). Section 110(a)(2)(D) plainly satisfies that standard. It quite specifically directs EPA to ensure that each SIP contains adequate provisions to prevent emission of air pollutants in amounts that, inter alia, "contribute significantly to nonattainment in, or inter-

fere with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. 7410(a)(2)(D). Section 110(a)(2)(D) simply confers the normal quantum of discretion that agencies routinely exercise in administering statutory programs. See, *e.g.*, *Chevron U.S.A.*, 467 U.S. at 843-845.

APC's further suggestion that the Court should alternatively find "EPA's selection of its $2000-per-ton cut-off point" to be "arbitrary and capricious" is also without merit. APC Pet. 20-21. APC did not make that argument in the court of appeals and has not even identified it as a question presented in its petition for a writ of certiorari. See APC Pet. i. APC's argument rests on an out-of-context partial quotation from the court of appeals' nondelegation ruling. The court stated that the $2000-per-ton threshold, viewed from the perspective of *ATA*'s *nondelegation* ruling, is a "radically incomplete line-drawing device." Pet. App. 26a; APC Pet. 20. The court nevertheless expressly acknowledged the extensive *factual* support for the $2000-per-ton threshold in the administrative record. Pet. App. 27a.[18]

Whatever the merits of the court of appeals' nondelegation ruling in *ATA*, that decision does not alter the established standard for determining whether an agency's action is arbitrary or capricious. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (a court is limited to examining

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[18] See Pet. App. 27a ("EPA indicates that it rested the $2000/ton figure on 'NOx emissions controls that are available and of comparable cost to other recently undertaken or planned NOx measures'") (quoting 63 Fed. Reg. at 57,400). EPA's determination was based on extensive analysis of emission control data that was fully documented in the rulemaking record. See 63 Fed. Reg. at 57,377-57,378, 57,399-57,403.

whether the agency's action "was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). EPA amply justified its choice of the $2000-per-ton threshold in the rulemaking proceeding. 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. Hence, even if APC had raised a challenge to EPA's selection of that threshold under the arbitrary or capricious standard in the court of appeals, the challenge would have failed. There is no reason for this Court to address, for the first time in this case, that entirely factbound question.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted.

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Nos. 00-632 and 00-633

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., KEYSPAN GENERATION LLC, PECO ENERGY COMPANY, AND PSEG POWER LLC

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QUESTION PRESENTED

Whether this Court should grant certiorari to consider the Court of Appeals' correct determination that the Environmental Protection Agency did not abuse its discretion or violate the federalist structure of the Clean Air Act when it considered a cost factor in the determination of significant contribution under Section 110(a)(2)(D) of the Act.

PARTIES TO THE PROCEEDINGS AND RULE 26.1 STATEMENTS

The following is a list of the parties filing this brief in opposition, together with their statements pursuant to S. Ct. R. 26.1. These parties were intervenors below in support of affirmance and are respondents in this Court pursuant to S. Ct. R. 12.6:

Consolidated Edison Company of New York, Inc., states that its parent corporation is Consolidated Edison, Inc., a publicly held corporation. Consolidated Edison Company has no affiliates or subsidiaries that have issued shares or debt securities to the public.

KeySpan Generation LLC states that its parent corporation is MarketSpan Corporation, d/b/a KeySpan Energy, a publicly held company. An affiliate of KeySpan Generation LLC, The Houston Exploration Company, has also issued shares or debt securities to the public.

PECO Energy Company states that its parent company, Exelon Corporation, has issued stock to the public. no other affiliates or subsidiaries of the Company have issued shares or debt securities to the public.

PSEG Power LLC (formerly Public Service Electric & Gas Co.) states that its parent company, Public Service Enterprise Group Incorporated, has issued stock to the public. No other affiliates or subsidiaries of PSEG Power have issued shares or debt securities to the public.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., KEYSPAN GENERATION LLC, AND PSEG POWER LLC

Respondents Consolidated Edison Company of New York, Inc., Keyspan Generation LLC, and PSEG Power LLC respectfully request that the Court deny the petitions for certiorari filed in this case by the State of Michigan, *et al.* in No. 00-632 ("Michigan") and by the States of Ohio and Indiana in No. 00-633 ("Ohio and Indiana"). We refer to these petitioners collectively as "Petitioning States."

INTRODUCTION

This case meets none of the criteria warranting an exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10. It implicates no conflict among the circuits and raises no important unsettled questions of law. To the contrary, this case involves the ordinary exercise of discretion by the Environmental Protection Agency ("EPA") in implementing a statutory provision of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q (1994 & Supp. III 1997), requiring states to address the interstate transport of air pollution. The rule at issue, 63 Fed. Reg. 57,356-537 (Oct. 27, 1998), which is referred to as the "NOx SIP Call," requires certain states to revise their State Implementation Plans ("SIPs") to reduce emissions of nitrogen oxides (NOx) that impact ozone attainment problems in downwind areas.

In an attempt to transform this typical administrative rulemaking case into one worthy of this Court's review, Petitioning States argue that the Court of Appeals decision in this case conflicts with holdings of the D.C. Circuit in other CAA cases, including *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 ("*ATA*"), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 2193 (2000). Petitioning States' attempt to manufacture certworthy issues from superficial similarities in these cases is misguided. Far from implicating important jurisprudential conflicts, this case involves an unremarkable affirmation of agency discretion consistent with well-settled law.

Petitioning States also argue that this case raises important federalism and interstate equity issues relating to the interstate transport of air pollution that require this Court's review. While the CAA provision at issue certainly does implicate issues of federalism and interstate equity, the D.C. Circuit correctly determined that EPA's rulemaking was properly responsive to these concerns. Petitioning States do

not provide any compelling arguments for devoting this Court's scarce resources to further review of these matters.

Respondents filing this opposition provide the Court with an important perspective on the rule at issue in this case: that of electric generating companies in downwind states who view the NOx SIP Call as a soundly reasoned, technologically and economically feasible, *necessary* step to address the complex and persistent problem of interstate transport of ozone.

Over the last decade electric generators in downwind states have invested many millions of dollars in control technologies to improve air quality and assist in their states' efforts to attain the national ozone standard. The beneficial health impacts of these emission control efforts, however, have been largely thwarted by imported NOx from upwind sources in the South and Midwest that are not subject to as strict emission control requirements and can produce electricity using higher-emitting, cheaper fuel sources. Their transported emissions intermingle with other airborne emissions and significantly increase downwind states' ozone levels. By requiring upwind states to control their sources not only to prevent local air pollution but to prevent—as the CAA requires—significant contribution to ozone attainment problems downwind, the NOx SIP Call will remedy this gross inequity and its resulting adverse health impacts.

COUNTERSTATEMENT

As Petitioning States explain, Michigan at 4-5, Ohio and Indiana at 3-4, Section 110(a)(2)(D) of the CAA, 42 U.S.C. § 7410(a)(2)(D), requires states to prevent air pollution sources located within their boundaries from significantly contributing to air quality attainment problems in downwind states. Pursuant to its expressly delegated authority to implement that provision, EPA promulgated the NOx SIP

Call, requiring certain states in the eastern half of the United States to revise their state air quality plans to eliminate amounts of NOx emissions that EPA had determined were "significantly contributing" to downwind ozone attainment problems.

While Petitioning States characterize EPA's calculation of "significant contribution" in the NOx SIP Call as one based solely on cost considerations, *see* Michigan at 6-7, Ohio and Indiana at 4, EPA's determination of significant contribution was in fact a two-step process based primarily on air quality factors and only secondarily on cost considerations.

In the first step, the agency identified states that were "significantly contributing" to downwind attainment problems, using air quality modeling that determined whether the NOx emissions of a state, when combined with emissions from other states, were a significant factor in the formation of ozone in downwind states. *See* 63 Fed. Reg. at 57,381. Only after having thus identified, on the basis of air quality factors alone, the states that were significantly contributing to ozone attainment problems downwind did EPA use a cost-based methodology to calculate the amounts of NOx emissions that these states could permissibly emit without violating the Section 110 prohibition on significant contribution. *Id.*

Because air quality modeling is not well-adapted to quantify precise emissions impacts, [1] in this second step EPA identified a set of cost-effective control technologies and then, using state-specific NOx inventory information, modeled the air quality impacts of applying these technologies to the covered states. Finding that the resulting levels of NOx emissions would significantly reduce ozone formation in

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[1] Air quality models, particularly broad regional scale models such as those used in the NOx SIP Call, are excellent tools for identifying directional trends and relative impacts, but are not regarded as well-suited for determining precise quantities of emissions impacts.

downwind states, EPA established those levels as state-specific "NOx budgets"—for each state, the total amount of NOx emissions that could be emitted consistent with Section 110's prohibition on significant contribution to transport. Specifically, EPA's NOx emission budgets were based on the NOx emissions levels that would be permitted in these states under uniform application to their NOx inventories of certain NOx pollution controls that EPA had determined could be cost-effectively implemented at $2,000 per ton or less. *See* 63 Fed. Reg. at 57,365.

The Court of Appeals upheld EPA's consideration of this cost factor in its determination of significant contribution under Section 110(a)(2)(D). It also rejected challengers' arguments that the CAA requires state-specific quantifications of significant contribution and that the SIP Call Rule impermissibly denied states their rights under the CAA to determine their implementation strategies.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DECISIONS OF THE D.C. CIRCUIT

In an attempt to manufacture a case for certiorari where none exists, Petitioning States argue that the decision below conflicts with holdings of this Court and with prior decisions of the D.C. Circuit regarding EPA's discretion to consider costs in implementing the CAA. *See* Michigan at 7-8, 20-21; Ohio and Indiana at 14-15. Specifically, Petitioning States point to two of this Court's cases, *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), and *Train* v. *NRDC*, 421 U.S. 60 (1976), addressing EPA's authority to consider economic factors when evaluating the adequacy of a state's SIP submittals under CAA Section 110, 42 U.S. § 7410, and to two D.C. Circuit decisions, *Lead Indus. Ass'n* v. *EPA*, 647 F.2d

1130 (D.C. Cir.), *cert. denied,* 449 U.S. 1042 (1980), and *ATA,* 175 F.3d 1027, holding that EPA lacks authority to consider costs when setting National Ambient Air Quality Standards ("NAAQS") under CAA Section 109, 42 U.S.C. § 7409.

A. The Decision Below Does Not Conflict With Decisions Of This Court Addressing EPA's Authority To Consider Cost Factors Under CAA Section 110.

The decision below does not conflict with the Section 110 precedents of this Court cited by Petitioning States. In both *Union Electric,* 427 U.S. at 257 & n.5, and *Train*, 421 U.S. at 90-91, the Court addressed arguments about EPA's authority under provisions of Section 110 other than Section 110(a)(2)(D) to consider claims of economic and technological *infeasibility—i.e.*, to use cost considerations to excuse a state's failure to comply with EPA's interpretation of the requirements of Section 110. These cases are distinguishable first because they involve challenges to agency action arising under, and interpreting, different provisions of Section 110 than the one at issue in this case. More importantly, the underlying principle of these cases—that EPA may not rely on cost factors to allow states to *impede* CAA compliance—does not conflict with the decision below upholding EPA's use of a cost factor in its determination of how states must comply with Section 110(a)(2)(D)'s transport prohibition.

Indeed, in *Union Electric* this Court expressly addressed EPA's authority to consider costs in the context of facilitating rather than hampering compliance with Section 110. As Petitioning States acknowledge, Michigan at 9 n.4, the Court indicated that, in evaluating whether a SIP includes provisions for attaining the NAAQS "as expeditiously as practicable" as required under Section 110(a)(2)(A)(i), EPA "may consider whether it is economically or technologically

possible for the state plan to require more rapid progress than it does." *Id.* (citing *Union Electric*, 427 U.S. at 265, n.13). EPA's use of a cost factor in determining significant contribution in the NOx SIP Call is consistent with the principle that the agency may consider costs in the context of facilitating state compliance with Section 110's air quality goals. [2]

B. The Decision Below Does Not Conflict With D.C. Circuit Decisions Addressing EPA's Authority To Consider Cost Factors Under CAA Section 109.

Contrary to Petitioning States' assertions, the D.C. Circuit's holding in the *ATA* and *Lead Industries* cases—that EPA is prohibited from considering costs when establishing the NAAQS under Section 109—does not conflict with the decision below upholding EPA's authority to consider cost factors in determining significant contribution under Section 110(a)(2)(D). Sections 109 and 110 are different statutory sections with different purposes. Section 109 requires EPA to set NAAQS that, "based on [statutory] criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b). Section 110 is a very lengthy section with many different provisions detailing the many obligations of states with respect to their air quality implementation plans. EPA is charged with responsibility for implementing both sections, of course, but the statutory

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[2] Another circuit has also concluded that cost considerations are permissible in enforcing Section 110's requirements where those considerations are employed to achieve, not impede, compliance with Section 110's air quality goals. *See South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974) (observing, with respect to EPA regional transportation control plan imposed as a Federal Implementation Plan under Section 110, that "[e]conomic considerations may play some role * * * in EPA's selection among alternative means to achieve its mandated clean air goal").

standards that EPA must interpret in defining the agency's and the states' obligations under the two sections are entirely unrelated to each other.

Thus, the decision below does not present an issue similar to the one before this Court in *ATA*. Indeed, the Court of Appeals expressly noted that the NOx SIP Call case only concerned whether EPA could permissibly consider cost in its implementation of Section 110(a)(2)(D) and did not raise issues as to whether the agency was required to consider costs or was permitted to use a cost/benefit criterion in selecting its final rule, Michigan App. at 15a-16a, issues that are raised in *ATA*. [3]

Certainly, the judges who authored the opinion below would be surprised to learn that the decision conflicts with prior D.C. Circuit precedent. The opinion provides a lengthy analysis of how the decision is derived from the "settled law of this circuit." Michigan App. at 20a-22a. In particular, the opinion focuses on a prior case upholding EPA's authority to consider costs when regulating hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. § 7412, to achieve an "ample margin of safety" to protect public health, *see* Michigan App. at 20a (citing *NRDC* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc)). The Court of Appeals observed that *NRDC*, along with several other cases, stands for the principle that unless there is "clear congressional intent to

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[3] Indeed, the lack of conflict between the D.C. Circuit's holdings is evidenced by the fact that the decision below issued only ten months after the *ATA* decision, with parts of both decisions authored by the same judge; clearly, Circuit Judge Williams did not perceive any conflict between the two cases. Further, petitions for rehearing were rejected by the D.C. Circuit. *See* Michigan App. at 55a-58a.

preclude consideration of cost," an agency is not barred from considering it. *Id.*

Applying the *NRDC* standard, the D.C. Circuit concluded that EPA's consideration of cost factors in the significant contribution determination was permissible, stating that "there is nothing in the text, structure or history of § 110(a)(2)(D) that bars EPA from considering cost in its application." *Id.* at 22a.

There is nothing about this holding that remotely warrants this Court's intervention. There is no conflict between it and the other cited cases addressing EPA's authority to consider costs under Sections 109, 110, or 112. Indeed, the CAA precedents are consistent with each other. They indicate that EPA's authority to consider cost factors when implementing the CAA must be determined on a case-by-case basis through analysis of congressional intent, as revealed by the text of the statutory provision under which the agency acts and other appropriate indicia, as well as the factual circumstances of the specific consideration of costs at issue.

In reality, Petitioning States do not seek from this Court a "resolution" of the Section 109 and Section 110 precedents, but rather a modification of earlier holdings with which they disagree. *See, e.g.*, Michigan at 21 (advocating that this Court "resolve" alleged conflict by flipping the D.C. Circuit's prior holdings and deciding that EPA *must* consider costs under Section 109 but *cannot* consider them under Section 110); *see also* Ohio and Indiana at 14-15 (advocating that this Court hold that EPA *may* consider costs under both Sections 109 and 110, but only as a secondary factor to health concerns under Section 109 and to air quality concerns under Section 110).

Given Petitioning States' failure to demonstrate any conflicts between the decision below and other CAA cases addressing EPA's authority to consider costs, as well as the

lack of identity between the issues in this case and those in *ATA*, this Court should deny the request of Ohio and Indiana to defer consideration of the certiorari petitions until after resolution of the *ATA* cases. *See* Ohio and Indiana at 16 n.8, 17.

Even were this Court persuaded that there is some tension in D.C. Circuit precedents regarding EPA's authority to consider costs in implementing the CAA, it is well-settled that this Court does not sit to resolve intracircuit conflicts. The established principle, as Justice Harlan once wrote, is that "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Robert L. Stern, et al., Supreme Court Practice 176 (7th ed. 1993) (quoting Hon. John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)). The *en banc* process is the established means of identifying and settling any intracircuit conflicts.

Petitioning States also attempt to argue that, because EPA actions under the CAA that have nationwide scope can only be reviewed by the D.C. Circuit, conflicts among D.C. Circuit CAA decisions are "on par" with conflicts between different circuits. Michigan at 19. They offer no support for this theory, which is inconsistent with the very reason the CAA provides nationwide jurisdiction in the D.C. Circuit in the first place.

II. THE DECISION BELOW CORRECTLY AFFIRMED EPA'S DISCRETION TO CONSIDER COST FACTORS IN THE DETERMINATION OF SIGNIFICANT CONTRIBUTION

The issue before the D.C. Circuit was not whether EPA's consideration of a cost factor under Section 110(a)(2)(D) is the correct way to determine significant contribution, but

whether it is a permissible one. Neither the CAA nor its legislative history detail how Congress intended the phrase "contribute significantly" to be interpreted.[4] Thus, as established under *Chevron*'s familiar two-step framework, the question for a reviewing court is whether the agency action is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). EPA's interpretation is reviewed with great deference and upheld if reasonable. *See, e.g., Association of Am. Railroads* v. *Surface Transp. Bd.*, 161 F.3d 58, 64 (D.C. Cir. 1998) (court engaging in *Chevron* step-two analysis affords "significant leeway" to agency interpretation); *OSG Bulk Ships, Inc.* v. *United States*, 132 F.3d 808, 814 (D.C. Cir. 1998) (court accords "great deference to the particular way in which the agency chooses to implement a statute that it is empowered to administer"). Deference to EPA's interpretation is indeed at its zenith in this case due to the highly technical nature of the significant contribution determination and the complex statute in which it is embedded. *See New York* v. *EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988) (court accords great deference to decisions within agency's "area of special expertise, at the frontiers of science"), *cert. denied*, 489 U.S. 1065 (1989).

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[4] Petitioning States Michigan *et al.* argue that the "plain language" of Section 110(a)(2)(D), and the legislative history associated with it, make clear that "[t]he word 'significantly' goes to the level of the impact and cannot reasonably be interpreted to allow the consideration of economic efficiency." Michigan at 13. As they note, the 1990 Amendments changed the transport prohibition from a prohibition on interstate pollution that "prevent[ed] attainment" downwind to the current significant contribution standard. While Petitioning States see this change as indicating that the word significantly goes to the level of impact, it is just as plausible that the amendment from "prevent" to "significantly contribute" reflects congressional awareness that it is difficult, if not impossible, from an air-quality perspective alone to quantify the role of particular upwind states in determining downwind attainment.

The record in this case more than substantiates the Court of Appeals' judgment that EPA's consideration of costs in implementing the transport prohibition was permissible and reasonable. As detailed above, the court concluded, based on well-established precedent, that nothing in the CAA precludes EPA from considering cost when making a remedial determination under its authority to issue SIP Calls. Further, the D.C. Circuit recognized that EPA exercised its discretion to consider costs under Section 110(a)(2)(D) in an appropriate manner. Indeed, the court stated that "[i]n some contexts, 'significant' begs a consideration of costs," Michigan App. at 19a, and detailed at length its reasons for concluding that the determination of significant contribution under Section 110(a)(2)(D) was a circumstance that warranted consideration of costs, *see id.* at 19a-22a.

Petitioning States assert that EPA's determination of significant contribution relied on an "arbitrary, unbounded" standard. *See* Ohio and Indiana at 9-12; *see also* Michigan at 23 n.13. Petitioning States are wrong. As the Court of Appeals recognized, EPA's consideration of cost in its significant contribution determination was a reasonable decision, given the complexities of ozone transport, to design a solution based on determining whether downwind attainment problems could be addressed by eliminating at least the amounts of NOx emissions that could be most cost-effectively eliminated. *See* Michigan App. at 14a-15a. Moreover, EPA's air quality evaluation of the cost methodology included modeling and comparative analysis of the downwind impacts of the cost-effective state NOx budgets as well as of more stringent control measures. *See* 63 Fed. Reg. at 57412-13. Thus, EPA's use of a cost factor was neither arbitrary nor unbounded but rather reflected a complex, reasoned approach to identifying and addressing significant contribution.

Moreover, the agency's decision to consider cost-effectiveness in devising a remedy for states' violations of Section 110(a)(2)(D) is consistent with basic principles of ozone nonattainment planning. As reflected in twenty years' worth of congressional guidance, Congress and EPA have consistently concluded that in the absence of complete knowledge on the sources and receptors of ozone transport, it is reasonable to assign a level of emissions control to states based on the technical and economic feasibility of available controls.[5] Accordingly, as the Court of Appeals properly recognized, Michigan App. at 18a-20a, it was entirely appropriate for EPA to take such factors into account, in conjunction with air quality factors, to calculate the emission reductions necessary for states to comply with Section 110's transport prohibition.

Indeed, EPA's use of a cost factor in the NOx SIP Call is consistent with the views expressed by Petitioning States regarding when consideration of cost is appropriate under Section 110. *See, e.g.*, Ohio and Indiana at 15 (stating that cost consideration is appropriate under Section 110 when the consideration of cost is secondary to air quality factors) and Michigan at 21 (stating that cost considerations are appropri-

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[5] The central concepts guiding federal and state ozone attainment efforts over the past two decades have been requirements related to "reasonably available control measures" (RACM) and "reasonably available control technology" (RACT). *See, e.g.*, 42 U.S.C. § 7511(b)(2)(A) (requiring ozone nonattainment areas to be reclassified to follow through on requirements in § 7511a to implement RACT measures); *id.* § 7511c (requiring states in Northeast Ozone Transport Region to implement RACT). And for more than two decades, EPA policy and guidance have interpreted RACM and RACT requirements to call for the implementation of controls that are technologically and *economically* feasible. *See, e.g.*, 45 Fed. Reg. 59,331 (Sept. 9, 1980) (defining RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility").

ate under Section 110 when they are "relevant to [the] decision and indispensable in providing a reasoned basis for the agency's action").

Thus, Petitioning States have not established any grounds warranting this Court's review of EPA's consideration of cost in determining significant contribution under Section 110(a)(2)(D).

III. EPA'S SIGNIFICANT CONTRIBUTION DETERMINATION DOES NOT VIOLATE FEDERALISM OR INTERSTATE EQUITY CONCERNS

Petitioning States Ohio and Indiana argue that EPA's approach in the NOx SIP Call is not consistent with the "federalism-sensitive" approach of the CAA because it improperly ignores the significance of state boundaries and does not base emission reduction obligations upon an assessment of each state's proportionate contribution to downwind attainment problems. Ohio and Indiana at 9-16. They also contend that the decision below deserves review because, like other state border disputes involving natural resources, this case involves an important national problem and the States are opposed to one another concerning the allocation of responsibility for solving this problem. *Id.* at 16-17. These arguments merely rephrase complaints that have already been considered and rejected in the decision below. *See* Michigan App. at 11a-13a, 22a-23a and 33a-37a (holding that EPA conducted sufficient state-specific analyses of significant contribution, that EPA's use of regional uniform controls to calculate the states' NOx budgets was reasonable, and that EPA's specification of NOx budgets did not violate states' rights under the CAA to make implementation decisions).

A. EPA's Significant Contribution Determination Does Not Ignore the Significance of States' Boundaries in Determining their Reduction Obligations.

Ohio and Indiana argue that EPA's significant contribution determination violates the "cooperative federalism" scheme of the CAA by ignoring the significance of state boundaries. Ohio and Indiana at 8. As Michigan, et al. describe, the CAA assigns EPA the responsibility to promulgate air quality standards and to determine whether states are meeting all applicable CAA requirements, while assigning to states the responsibility to design SIPs to achieve the federally-established CAA requirements. Michigan at 4. This scheme includes deference to state authority on intrastate issues and deference to federal authority on issues of interstate concern. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 103-108 (1972) (recognizing necessity of federal common law remedy for interstate water pollution where no federal statutory remedy exists). EPA's SIP Call is entirely consistent with this statutory federalism scheme. In the SIP Call, EPA properly met its statutorily-defined federal role under the CAA to determine which states were failing to meet their transport obligations under Section 110(a)(2)(D), and to require those states to revise their SIPs accordingly.

Moreover, contrary to the assertion that EPA's approach ignored the significance of state boundaries, EPA's approach respects the significance of state boundaries in several ways. First, as the Court of Appeals recognized, *see* Michigan App. at 33a-37a, in calculating a remedial strategy to address transport, EPA appropriately determined only the necessary emissions reductions and left to the states to determine for themselves the best implementation strategies, as required by *Virginia v. EPA,* 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). Second, EPA used inventories of NOx emissions from covered states to determine, applying its cost-effectiveness methodology, the

amounts of NOx emissions that each state could emit consistent with Section 110's prohibition on significant contribution. And third, as the D.C. Circuit recognized, *see* Michigan App. at 11a-13a, EPA conducted state-specific air quality modeling sufficient to confirm that the proposed state NOx budgets would satisfactorily address the prohibited regional transport.

Petitioning States also misleadingly imply that EPA's $2,000 per ton cost-effectiveness standard improperly affects states' implementation decisions about how to achieve the NOx emissions budgets derived from the standard, and that EPA's use of the cost factor resulted in EPA promulgating less stringent budgets than necessary for some states. *See* Ohio and Indiana at 13-14; Michigan at 22-25. To the contrary, EPA's significant contribution determination did not excuse any states from achieving the reductions EPA determined were necessary to address downwind impacts, nor does the cost factor EPA used in that determination play any role at all in state's implementation decisions. The states' obligations under the SIP Call are not to impose cost-effective controls, but rather to limit sources within their borders to the specific amounts of NOx emissions EPA determined, using the cost-effectiveness methodology, that each state could emit consistent with Section 110(a)(2)(D). As the Court of Appeals affirmed, Michigan App. at 33a-37a, the SIP Call appropriately leaves states free to achieve the mandated emissions levels in any manner they choose, including through expensive, technology-forcing mechanisms, if they desire. *See id.* at 37a. [6]

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[6] EPA's rule pointed out that certain controls—namely, controls on coal-fired electric generators and large industrial sources—would be the most cost-effective means of meeting the established budgets, but the agency made clear that states could employ any emissions control measure they chose to bring their emissions within the NOx budget requirements. *See* 63 Fed. Reg. at 57,400.

Thus, EPA's significant contribution determination is appropriately sensitive to federalism concerns. It does not ignore the significance of states' boundaries, nor does it interfere with states' implementation rights with regard to ozone transport.

B. The Federalism Structure of the CAA Does Not Require EPA to Adopt a Proportional Interpretation of States' Emission Reduction Obligations under Section 110(a)(2)(D).

Ohio and Indiana urge this Court to find with respect to interstate transport that the federalist scheme of the CAA requires that each State "contribute to the solution in proportion to its contribution to the problem," Ohio and Indiana at 14. They do not explain, however, why the cooperative federalism structure of the CAA requires that the term "significantly" in Section 110(a)(2)(D) must be interpreted in proportionate terms. Mathematical proportionality is but one possible interpretation of the "significant contribution" standard and, as detailed above, it is not the interpretation that EPA, in its discretion, found to be the most reasonable in the context of ozone transport.

Petitioning States support their arguments by detailing some apparently anomalous or nonproportional results of EPA's significant contribution determination that they allege violate federalism and state sovereignty principles. *See* Ohio and Indiana at 12-13; Michigan at 22-24. For example, Ohio and Indiana complain that "a relatively large contribution of ozone [from Pennsylvania to New York] is considered insignificant under EPA's standard while a nominal contribution of ozone [from Indiana to New York] is considered significant."[7] Ohio and Indiana at 13; *see also* Michigan at

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[7] Ohio and Indiana do acknowledge that "[o]f course, Indiana has an effect on other downwind nonattainment areas besides New York," Ohio and Indiana at 13 n.6, but still assert that somehow Indiana's emission reduction obligations should be based on the "actual amounts" contributed to ozone problems elsewhere. What

24-25 (complaining that such outcomes illegitimately require states to do both more and less than Congress intended them to do to address interstate transport).

The Court of Appeals properly rejected similar complaints below when it determined that EPA's state-specific modeling was sufficient to support the rationality of the NOx SIP Call, *see* Michigan App. at 11a-13a, and that EPA's use of regionally uniform controls to establish the budgets was reasonable, *see id.* at 22a-23a. The isolated examples of nonproportional outcomes raised by Petitioning States do not warrant this Court's review of the lower court's findings. The examples are based on modeling of unidimensional, static and partial outcomes of the SIP Call (that is, impacts from one state to one other state) when in reality ozone transport is multidimensional and dynamic (that is, each state impacts and is impacted by multiple other states in a constantly changing scenario).

In the real world, the "significance" of an upwind state's NOx emissions on downwind ozone nonattainment is a function not only of air movements, weather, and chemical transformations that vary endlessly over time, but also of the actions of all the other upwind sources in other states, as well as federal, state and local air pollution laws and other factors. In these circumstances, as the court below found, EPA's functional interpretation of the term "significantly" reasonably implements the CAA's transport prohibition, particularly as EPA's interpretation is also appropriately sensitive to states' rights and interstate equities under the CAA.

Ohio and Indiana fail to acknowledge, however, is that determining "the" "actual" amounts that Indiana will contribute to downwind problems in other states is in some sense a conceptual conundrum, as those amounts will vary at different times not only with different weather patterns but also with variations in the emission amounts coming from other states.

C. EPA's Significant Contribution Determination Does Not Raise Interstate Equity Issues Requiring this Court's Review.

Ohio and Indiana argue that this case is similar to the disputes among States concerning borders and natural resources over which this Court has exercised original jurisdiction, *see* Ohio and Indiana at 17. To the contrary, this case is nothing like those cases, which typically have arisen under common and state law. The current case arises under one of the most detailed and comprehensive federal regulatory statutes, a statute in which Congress expressly answered the difficult question of how the burdens of interstate transport should be addressed. Section 110(a)(2)(D) of the CAA clearly indicates that states must control their sources to prevent significant contribution to downwind attainment difficulties. Given this unequivocal congressional directive, and the fact that the Court below correctly upheld the agency's approach to implementing it, there is no need for further review by this Court of the reasonableness of the agency's approach.

Moreover, contrary to the view of Petitioning States Ohio and Indiana, the fact that States are lined up against one another with regard to the NOx SIP Call does not indicate a flawed rule mandating review by this Court. Rather, it reflects the difficulty of devising a rule to address interstate responsibility for ozone transport that can please every state. Indeed, as Michigan et al. acknowledge, the inability or unwillingness of states to meet their obligations to eliminate downwind pollution contributions is an important reason that Congress revised the CAA in 1990 to strengthen the statutory provisions addressing interstate transport, including Section 110(a)(2)(D). *See* Michigan at 13. Thus, in this case, EPA has simply performed its congressionally-delegated federal role of determining how states must meet their transport obligations, a role made all the more important since the states' interests are diverse from each other.

In addition to addressing the interstate transport problem, however, EPA's approach in the NOx SIP Call also serves to rectify an existing inequity among states' air pollution control schemes that has resulted from the impacts of ozone transport. For decades, sources in the South and Midwest—areas generally in attainment with the national ambient air quality ozone standards—have been able to emit vast amounts of NOx emissions that travel downwind to North-east and Mid-Atlantic states not in attainment with ozone air quality standards. These downwind states suffer not only adverse health and environmental effects from the pollution transported into the region, but also have been required to impose increasingly stringent and costly control measures on sources within their borders as they try to reach ozone attainment. In particular, electric generating companies in downwind states have been forced to install expensive emission control equipment to address not only their local emissions but also those transported from upwind regions.

By requiring states to comply with Section 110(a)(2)(D) 's transport prohibition, the SIP Call brings upwind states to account for the NOx emissions their sources send downwind, and does so while recognizing the economic constraints on upwind states' ability to implement emission controls. Thus, the SIP Call promotes both cleaner air and a more equitable allocation of the regional pollution reduction burden, as EPA has recognized, *see* 63 Fed. Reg. at 57,404.

In short, EPA's determination of significant contribution is appropriately sensitive to issues of federalism and interstate equity and does not warrant attention from this Court. Congress has required states to prevent significant contribution to downwind attainment problems and delegated to EPA the duty to ensure that states comply. As the D.C. Circuit held, EPA's significant contribution determination properly took into account state-specific factors and does not improperly deny states their congressionally-assigned implementa-

tion role in the CAA statutory scheme. While Petitioning States may disagree with this result, they have identified no compelling reason for this Court to devote its scarce resources to an exercise in purported error-correction.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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THE STATES OF OHIO AND INDIANA, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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EPA FAILED TO CONSIDER AIR QUALITY FACTORS AS REQUIRED BY SECTIONS 110(a)(2)(D)(i)(I) AND (k)(5) OF THE CLEAN AIR ACT IN MAKING THE NOx SIP CALL

EPA wrongly criticizes Petitioners for a "mistaken characterization of the manner in which EPA considered costs in the [NOx SIP call] rulemaking." EPA Brief in Opposition ("EPA Opp.") at 10. Petitioners Ohio and Indiana do not dispute, and recognized in their brief, Ohio Pet. 4, that EPA used air quality modeling to identify the 23 States *included* in the NOx SIP Call rule. Even EPA claims a focus on air quality only as "the principal basis" for determining a State's "*inclusion* in the SIP Call." EPA Opp. 10. (Emphasis added.)

But including a State in the NOx SIP Call, and thus imposing some additional controls, differs substantially from determining the amount of a particular State's "significant contribution" to downwind nonattainment and the measures "necessary" to adequately mitigate the offending downwind pollution.[1] EPA's discussion of its use of air quality factors fails to fully emphasize that EPA abandoned consideration of air quality factors in favor of cost effectiveness in making the critical "significant contribution" and "necessary mitigation" determinations under Sections 110(a)(2)(D)(i)(I) and 110 (k)(5).

EPA used air quality factors to identify myriad linkages between various upwind and downwind States, and, above some "very low threshold," 213 F.3d 663, at 675, determined that 23 States should be required to

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[1] *See also* 63 Fed. Reg. at 57381, where, in discussing its use of its multifactor test to identify "covered states," EPA carefully distinguished its finding that upwind State emissions were "significant" in that they are sufficiently large to warrant requiring controls for that State (*i.e.*, large enough to include the State in the SIP Call) from the "actual finding of significant contribution," which "applies only to the portion of the State's emissions for which EPA has identified highly cost-effective controls."

revise their state implementation plans (SIPs). But EPA failed to use the information it generated on air quality factors to finish its statutorily-mandated task.

Congress mandated that state implementation plans contain adequate provisions prohibiting emissions from "contributing significantly" to nonattainment of National Ambient Air Quality Standards in downwind States, 42 U.S.C. 7410(a)(2)(D)(i)(I), and authorized EPA to require plan revisions only "as necessary to correct" plan inadequacies. 42 U.S.C. 7410(k)(5). EPA never identified in air quality terms the significant contribution of each State so that the State could assess the necessary actions to correct the inadequacy. As dissenting Judge Sentelle asked: under this statutory mandate, "what should EPA look for as being contributed significantly? Congress clearly answered that question for the agency as being the 'amount' of an 'air pollutant.'" 213 F.3d at 696. Instead, EPA used the blunt instrument of a one-size-fits-all, $2,000-per-ton cost-effectiveness standard, which had the effect of disregarding the variable nature of the linkages, rather than addressing them. EPA did not follow the statutory mandate.

Consequently, EPA has also disregarded the principles of cooperative federalism embodied in the Clean Air Act. EPA acknowledges that the Clean Air Act "makes 'the States and the Federal Government partners in the struggle against air pollution.'" EPA Opp. 3, citing *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA's one-size-fits-all cost-effectiveness approach makes States not so much partners as functionaries. EPA's approach makes the unit of the State largely irrelevant in defining the actual significant contribution of ozone and in defining its cure. The approach obliterates the State's ability to gauge and address its relative share of the downwind pollution it is causing. State boundaries serve only as *ad hoc* dividing lines for apportioning the $2000-per-ton common solution.

Faced with an alleged linkage of ozone transport to Western Pennsylvania, Ohio might, for example, use air

quality data and modeling to fashion a mitigation scheme that focuses upon NOx-emitting sources along the Ohio River.[2] Whether the resulting scheme would cost more or less than $2000 a ton in air pollution controls when added to the costs of additional control plans to address alleged linkages to other downwind States, the State of Ohio is nonetheless addressing what modeling shows is *its* air quality contribution. Contrary to the statute, the one-size-fits-all cost approach makes the State's pollution contribution irrelevant above the initial NOx SIP Call inclusion thresholds.

EPA states that it "found that the non-uniform approaches provided no significant advantages over the uniform approach, in terms of either air quality or cost. . . ." EPA Opp. 17. That does not justify choosing a uniform approach over a non-uniform approach when the statute clearly favors the latter. Indeed, EPA's finding indicates that there should be no air-quality or cost impediment to a non-uniform approach.

Nor should the fact that upwind States contribute in varying degrees to numerous downwind States justify the implication that everything "evens out," so the one-size-fits-all cost approach is reasonable. Petitioners Ohio and Indiana noted the inequity in the fact that Pennsylvania contributes to 18 percent of the amount of ozone pollution in New York above the national standard, while Indiana contributes only one percent, yet both must reduce emissions pursuant to the $2,000-per-ton standard. Ohio Pet. 12. Respondent States New York, *et al.*, counter that, among other linkages, Indiana contributes, for example, an average of 17 percent of the ozone in Louisville while Pennsylvania contributes less

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[2] Of course, this example may be purely hypothetical, as EPA has proposed to determine that the Pittsburgh-Beaver Valley Ozone Nonattainment Area and the Lancaster Ozone Nonattainment Area have attained the 1-hour ozone National Ambient Air Quality Standard. 66 Fed. Reg. 1925 (Jan. 10, 2001).

than one percent. However, simply comparing percentages at different downwind areas can mask the varying magnitudes of the problem in the downwind areas receiving the pollution. The ozone problem in New York is greater than the ozone problem in Louisville. This is shown by the comparative numbers of "grid hours" of ozone exceedances, an input in EPA modeling and a rough measure of the severity or extent of the ozone problems in a downwind "receptor area."[3] For a period modeled by EPA, New York had 1,924 grid hours of exceedances and Louisville had 166 grid hours. *Air Quality Modeling Technical Support Document for the NOx SIP Call*, U.S. EPA, Office of Air and Radiation, Sept. 23, 1998, at p. I-13, I-17. Joint Court of Appeals Appendix of Industry Petitioners, Vol. 3, 1048, at 1350, 1354. By this measure, 18 percent of New York's ozone problem is a larger contribution than 17 percent of Louisville's ozone problem. EPA's uniform cost approach improperly amalgamates all these variations and denies a State the opportunity to comply with the "good neighbor" provision in a way commensurate with its contribution of pollutants to downwind States.

EPA's disregard of State-to-State variations in imposing the single $2,000-per-ton cost-effectiveness standard also cannot be excused on the basis of economic fairness. Contrary to EPA's claim, EPA Opp. 13, the statutory mandates of Sections 110(a)(2)(D)(i)(I) and (k)(5) do not identify economic fairness as a factor that should be considered by EPA to "equally distribute the burdens borne by all the States"; at least, it should not be considered in disregard of the States' relative contributions of downwind pollutants. Nor do the quoted

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[3] For modeling purposes, downwind receptor areas are divided into grids. Ozone exceedances for each grid square are tallied for the receptor area for a given period. A higher number of "grid hours" over a period indicates an ozone problem in an area that covers a larger area, or is more frequent, or both, when compared to an area with a smaller number.

passages from the legislative history support such a position. EPA Opp. 13, n. 10. The passage noting the need to "equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State," ties the responsibility for pollution control to the extent of pollution contributed. It does not suggest that costs be equalized regardless of the amount of pollution caused.

In sum, EPA's one-size-fits-all cost-effectiveness standard is not a reasonable application of Sections 110(a)(2)(D)(i)(I) and (k)(5). These Sections do not allow EPA to abandon so early and so completely the consideration of air quality factors in favor of a cost-effectiveness standard. When a statute includes an express factor, EPA must give that factor the greatest weight in interpreting the statute. *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987). Under the Section 110 mandates, EPA's first concern must be to define how much contribution of ozone from a State to a downwind State's nonattainment is "significant," *i.e.*, too much. The necessary mitigation required should be proportionate to that significant amount contributed. Petitioners Ohio and Indiana do not object to considering cost as a secondary factor, as when EPA assesses the adequacy of a revised SIP developed to reduce interstate NOx emissions. Cost should not be considered either in place of air quality factors or before "significant contribution" is first determined using air quality factors and the amount of pollution contributed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

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